No. 89-5809

In The

Supreme Court of the United States

October Term, 1989

ROBERT SAWYER,

Petitioner,

vs.

LARRY SMITH, INTERIM WARDEN,
LOUISIANA STATE PENITENTIARY,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

JOINT APPENDIX
VOLUME I

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PETITION FOR CERTIORARI FILED OCTOBER 16, 1989
CERTIORARI GRANTED JANUARY 16, 1990

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TWENTY-FOURTH JUDICIAL DISTRICT
COURT OF LOUISIANA

THE STATE OF LOUISIANA	)	Parish of JEFFERSON
Twenty-Fourth Judicial District	) SS.	
	)	Twenty-Fourth Judicial District Court

The Grand Jurors of the State of Louisiana, duly empaneled and sworn, in and for the body of the Parish of JEFFERSON in the name and by the authority of the said State, upon their Oath, present: That one CHARLES W. LANE and ROBERT W. SAWYER late of the Parish of JEFFERSON on or about the TWENTY-EIGHTH (28) day of SEPTEMBER in the year of our Lord, One Thousand Nine Hundred and SEVENTY-NINE (1979) with force of arms, in the Parish of JEFFERSON aforesaid, and within the jurisdiction of the Twenty-Fourth Judicial District Court of Louisiana, in and for the Parish of JEFFERSON aforesaid, then and there being committed first degree murder of Frances Arwood, contrary to the form of the Statute of the State of Louisiana, in such case made and provided, and against the peace and dignity of the State.

/s/ illegible
Asst. District Attorney
of the Twenty-Fourth
Judicial District.

Comp. #9-16496-79

24th JUDICIAL DISTRICT COURT
PARISH OF JEFFERSON, STATE OF LOUISIANA

Louisiana v. Robert Sawyer

(Transcript excerpts from Sentencing Hearings, September 19, 1980)

[934] THE COURT: Ladies and gentlemen, this phase of the trial is what is called a sentencing hearing. The jury in a capital case is given the authority to make a binding recommendation to the trial judge as to the sentence that should be imposed. You now have the duty to recommend whether the defendant shall be sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence. When recommending the sentence to be imposed you should consider the circumstances of the offense and the character and propensity of the defendant. At the conclusion of this hearing I will instruct you in detail as to what the law requires in deciding which sentence is to be imposed. What I [940] have given to you are two lists. One is a list of aggravating circumstances for you to consider and the other is a list of mitigating circumstances that would tend to benefit Mr. Sawyer. At the conclusion of this hearing you will take those two lists with you back into the jury room and then you will consider them along with whatever evidence is going to be presented to you right now.

MR. BOUDOUSQUE: I call Peter Thomas.

* * *

[Closing Arguments]

Argument by the state from 4:15 p.m. to 4:25 p.m. as follows:

MR. BOUDOUSQUE: Ladies and gentlemen, we are now at the second phase of the proceedings you were told about during the course of the voir dire. You will decide if the crime and relating circumstances fit into technical [981] definition of the law. The law states that the sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that at least one statutory aggravating circumstances exist and after consideration any mitigating circumstances recommends the sentence of death be imposed. The jury shall be furnished a copy with the statutory aggravating and mitigating circumstances. The State is going to contend there are four aggravating circumstances that the jury can find without a reasonable doubt. One, the following shall be considered, aggravating circumstance. When the offender is engaged in the perpertration (sic) or the attempted perpetration of an aggravated rape or an aggravated arson. Just the facts of the crime alone can be considered as an aggravating circumstance. Two, where the offender has been previously convicted of an unrelated murder, aggravated rape, aggravated kidnapping or has a significant prior history of criminal activity.

Well you have heard Robert Sawyer own sister tell you that he has been a follower of the law most of his life. You also heard of a 1974 conviction where the defendant took the life of a four year old child, was indicted for second degree murder and was convicted of involuntary manslaughter. Where the offense was committed in an especially heinous and atrocious and cruel manner. (The D.A. displays the photographs.) Need I say more, and where the offender knowingly [982] created a risk of death or great bodily harm to more than one person.

There were two small children as well as Cynthia Shano in that house. That will be a question of fact for the jury to decide. The law provides that if you find one of these circumstances then what you are doing as a juror, you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State Legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. No one likes to make those type of decisions but you have to realize if but for this man's actions, but for the type of life that he has decided to live, if of his own free choosing, I wouldn't be here presenting evidence and making argument to you. You wouldn't have to make the decision. This man is almost thirty years old, thirty-one years old. He is an adult. You heard his sister testify. I have compassion and I certainly have understanding and some [983] emotions about her feelings. Although I must tell you when I listened to some of the things that she said concerning how beautiful that four year old child was treated and I am somewhat maybe, maybe I was a little harder than I should have been when I asked her questions. For that I apologize, but it was only an instinctive reaction on

my part but the facts remain there are many of us in this life, life is not an easy thing but life is the most important thing we know and when someone takes it in his own hands for whatever reason because he wants to get it off and have his joys and jollies, when he decides to take another life into his hands and in this case two within a five year period, then the line has to be drawn. This man is never going to change. He has committed two homicides in five years. You have experienced a certain amount of emotions in this case. I am sure your heart goes out to his sister and maybe to his nephew. During the course of this trial I haven't been so lucky. The only person that I've been able to converse with is Mr. Beckendorf. Frances Arwood is not here. I wish she could tell you what she went through on September 28 when she was locked into that chamber of horrors, when over that extended period of time this man so savagely and brutally along with Charles Lane beat, kicked, poured scalding hot water, raped, set her on fire, see what I'm trying to say, that Frances is not here. I didn't ask her mother to come back. I thought that the emotional aspect of [984] what she had to undergo the first time was enough but think about how she feels. Think about that if that was your child or your wife or your relative. What I'm trying to say is that it is nice and easy to put Frances Arwood in the abstract but she will never know another sunrise. She will not know what is basic to you and me which is living. There is really not a whole lost that can be said at this point in time that hasn't already been said and done. The decision is in your hands. You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this

Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. I submit to you when you evaluate the facts of this case and you make a comparison with the atrocious nature of the facts of this case, the facts of the case that you heard about when little Laurie Durham, four year old, lost her life, I think you will decide that there are at least three or four aggravating circumstances which you could reasonably impose in order to justify a death penalty verdict. [985] It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. You've done the right thing so far. There can be no doubt that Robert Sawyer committed this crime. The evidence is strong and convincing although he still denies that. He still states he was so intoxicated he doesn't remember anything about this crime. He gave a statement two hours after the crime admitting or at least telling everyone about it. I could have cross examined him and gone more and more into it and gotten more and more lies but his guilt has already been decided.

I ask that you consider what I have just told you and I may or may not be back to speak to you in a brief rebuttal after Mr. Weidner argues. Thank you.

Closing argument by the Defense from 4:25 p.m. to 4:35 p.m. as follows:

MR. WEIDNER: Ladies and gentlemen, I don't quite know what to say. I have never been in this position before. I guess I am doing exactly what Mr. Boudousque told you I was going to do. The decision whether Robert Sawyer [986] lives or dies is in your hands for one very simple reason. Should you decide today that he gets life imprisonment, well then the issue of whether or not he would be executed never comes up again. The issue remains a life only if you decide that he should be executed. I don't know what I can say for Robert Sawyer. He is a poor miserable little human being. He has had a hell of a life. He was involved in a very heinous act. He has been in a mental hospital. Like Doctor Arneson told you probably a sociopath. We know and it is never been attempted to be rebutted that Mr. Sawyer was intoxicated the day this incident with Frances Arwood occurred. You obviously believe that he is guilty of first degree murder. That is your verdict. How can we believe, I know I can't, any one in their right mind or in possession of their faculties could do something like this. I personally do not agree with the death penalty. I don't think there is any circumstance when anyone has the right to kill another person no matter how we try to get away from it. That is what we would be doing is killing another person. Charles Lane is serving life imprisonment. I'm going to ask you to give Robert Sawyer the living death of life imprisonment. Don't kill. Thank you.

Rebuttal argument by the State from 4:35 p.m. to 4:40 p.m. as follows:

MR. BOUDOUSQUE: Mr. Weidner states that if you recommend life [987] imprisonment instead of the electric chair then you will never have to worry about the issue of whether or not Mr. Sawyer will receive the chair. At that point in time the only thing you will have to worry about is whether or not Robert Sawyer will ever be back on the streets of Jefferson Parish. The man's personality has already been formed. The statute speaks without benefit of probation, suspension, commutation of sentence. The statute does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. He speaks in terms of his personal feelings of the death penalty. Such a decision is never easy to make but if Louisiana law, if the law which we have in this state is to have any piece, if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their own homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the line because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior [988] conviction for killing a four year old child, then what are the people of this Parish to believe. They are going to

believe what a lot of people believe, there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect. Don't you see that the criminal justice system, ladies and gentlemen, is not the courts, it's not the judges, it's not technicalities of defense lawyers, it is nothing more than people like you and me and if you are not capable of making these types of decisions so well then you are right, there will be a breakdown and there has been a breakdown but I will tell you what imperfect is, the system is. At least this man has had the occasion to be judged by twelve men of his peers, twelve men and woman of his peers and in some other countries he may have been taken out and summarily executed. He has had the due process of law and then he expects you because Charles Lane he did that for a reason because he wants to say well Charles Lane got life imprisonment upon conviction of first degree murder but this man should get the same. Well if I were to tell you that Charles Lane, that I was the prosecutor in that case and the evidence that was presented for Charles Lane, Charles Lane never had a conviction.

MR. WEIDNER: Objection.

THE COURT: The Court sustains that.

[989] MR. BOUDOUSQUE: There are aggravating circumstances possibly Mr. Lane did not have.

MR. WEIDNER: Objection again.

MR. BOUDOUSQUE: I'm talking about aggravating circumstances.

THE COURT: You can argue that.

MR. BOUDOUSQUE: There are certain aggravating circumstances that are involved and maybe the jury didn't find that those aggravating circumstances existed and maybe the jury found that as a matter of fact he was a passing participant and not the main activist in this heinous chain of events. This is the man. He is the one and I think in your heart you know that so no matter how unpleasant or how difficult this type of decision may be for you to make, if you really analyze it you don't have a choice. There is only one verdict that can be rendered in this case and there will be a strong symbolism related to that penalty. You the people are part of the criminal justice system. You now know how it works. Now is that time and I ask that you recommend because all you are doing is making a recommendation. I ask that you recommend to this Court and to any other Court that reviews Robert Sawyer's case that as a jury based on all the facts and circumstances within your knowledge you recommend [990] the imposition of the death penalty. Thank you.

[Jury Instructions]

THE COURT: Ladies and gentlemen, before I begin, Charles Lane was not tried in this Court by you and I ask that you disregard any reference to Charles Lane's trial. That trial had nothing to do with or should have nothing to do with your deliberations. Whatever happened to Charles Lane certainly should be of no concern to you. All right.

Having found Robert Sawyer guilty of first degree murder you must now determine whether he should be

sentenced to death or to life imprisonment without benefit of probation, parole or suspension of sentence. It is your duty to consider the circumstances of the offense and the character and propensities of Robert Sawyer to determine which sentence should be imposed. In reaching your decision regarding the sentence you must be guided by these instructions. You are required by law to consider the existence of aggravating and mitigating circumstances in deciding which sentence to impose. The statutory aggravating circumstances are listed on the sheet of paper you have. The District Attorney contends that four of those circumstances are applicable to this case and if you look at your list you will see A, the offender was engaged in the perpetration or attempted perpetration of aggravated rape or aggravated arson. B, obviously does not apply. C states that the offender was previously convicted of an unrelated murder, aggravated [991] rape or aggravated kidnapping or I say significant prior history of criminal activity. Did the defendant knowingly create a risk of death or great bodily harm to more than one person and if you drop on down to G it states that the offense was committed in an especially heinous, atrocious or cruel manner. Before you decide that a sentence of death should be imposed you must unanimously find beyond a reasonable doubt that at least one statutory aggravating circumstance exist. If you find beyond a reasonable doubt that any of the statutory aggravating circumstances existed you are authorized to consider imposing a sentence of death. If you do not unanimously find beyond a reasonable doubt any of the statutory aggravating circumstances existed the life imprisonment without probation or parole or suspension of

sentence is the only sentence that may be imposed. Even if you find the existence of an aggravating circumstance you must also consider any mitigating circumstances before you decide a sentence of death should be imposed. The law specifically list certain mitigating circumstances and you have the list. These mitigating circumstances are A, the offender has no significant prior history of criminal activity. B, the offense was committed while the offender was under the influence of extreme mental or emotional disturbance. C, the offense was committed while the offender was under the influence or domination of another person. D, the offense was committed under circumstances [992] which the offender reasonably believed provide a moral justification or extension of his conduct. E, at the time of the offense the capacity of the offender to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication. F, the youth of the offender at the time of the offense. G, the offender was a principal whose participation was relatively minor and H, any other relevant mitigating circumstances. You will note that you are authorized to consider any relevant mitigating circumstances. The fact you are given a list of aggravating and mitigating circumstances should not cause you to infer the Court believes that any of these circumstances do or do not exist. The law requires that the jury be given such a list in every case. Whether any of the aggravating or mitigating circumstances exist is a fact for you to determine based upon the evidence presented. In addition to the evidence presented at this sentencing hearing in deciding the sentence to be imposed you may consider

evidence presented during the guilt determination trial that was brought you earlier. In just a moment the clerk will hand you two blank forms of verdicts. The first formal verdict reads having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to [993] death. In the event you should unanimously decide the death penalty should be imposed, a space is provided for you to write out the statutory circumstance or circumstances unanimously found to exist. The foreman will sign the form. The second formal verdict reads, the jury unanimously recommends that the defendant be sentenced to life imprisonment without benefit of probation, parole or suspension of sentence. This verdict form is to be used if you cannot unanimously agree that the death penalty should be imposed. If the jury decides that a life penalty without probation or parole or suspension of sentence should be imposed the foreman will sign that formal verdict, no listing of aggravating or mitigating circumstances are required if you use this second verdict form. Nothing said or furnished you in these instructions should be taken as an opinion of the Court as to the existence or not of statutory aggravating or mitigating circumstances. It is your responsibility in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or the life imprisonment. Go with Mr. Miller back in the jury room.

(Jury retired at 4:45 p.m. The jury returned at 5:20 p.m.)

THE COURT: Would you hand Mr. Miller the verdict form.

THE BAILIFF: Louisiana versus Sawyer. Verdict, having found [994] the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstances found: 1.) the offender was engaged in the perpetration of aggravated arson, 2.) the offender was previously convicted of an unrelated murder, 3.) the offense was committed in an especially heinous, atrocious and cruel manner. Signed Susan B. Roundtree, forewoman.

MR. WEIDNER: Would you poll the jury.

THE CLERK:

Q Mr. Ragas, is that your verdict?

A Yes.

Q Miss Roth, is that your verdict?

A Yes.

Q Mr. Andressen, is that your verdict?

A Yes.

Q Mr. Drumm, is that you verdict?

A Yes.

Q Mr. Akerman, is that your verdict?

A Yes.

Q Mr. Cacioppo, is that your verdict?

A Yes.

Q Mr. Leaber, is that your verdict?

A Yes.

Q Mr. Pollack, is that your verdict?

A Yes.

[995] Q Miss Roundtree, is that your verdict?

A Yes.

Q Mr. Wood, is that your verdict?

A Yes.

Q Miss Dunne, is that your verdict?

A Yes.

Q Miss Gusman, is that your verdict?

A Yes.

THE COURT: That is twelve. The Court will remand Mr. Sawyer to the Parish Prison and I will schedule sentencing later.

LOUISIANA VS. SAWYER

VERDICT

Having found the below listed statutory aggravating circumstance or circumstances and after consideration of the mitigating circumstances offered, the jury recommends that the defendant be sentenced to death.

Aggravating circumstances found:

(1) the offender was engaged in the perpetuation of aggravated arson;

(2) the offender was previously convicted of an unrelated murder;

(3) the offence was committed in an especially hideous, atrocious and cruel manner.

GRETNA, LOUISIANA, this 19th day of September, 1980.

/s/ Susan B. Roundtree
Foreman

STATE OF LOUISIANA, PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana
vs.
ROBERT SAWYER

No. 79-2841
Division G
Date SEPT. 19, 1980

DISTRICT ATTORNEY BOUDOUESQUE
JUDGE GAUDIN

THE COURT TOOK UP THE MATTER OF STATE OF LOUISIANA VS. ROBERT SAWYER.

PRESENT WERE:
PHIL BOUDOUESQUE REPRESENTING THE STATE

JAMES WEIDNER REPRESENTING THE DEFENSE
ROBERT SAWYER THE DEFENDANT

THE JURY WAS POLLED. ALL PRESENT.

10:05 CLOSING ARGUMENTS BY THE STATE
CLOSING ARGUMENTS BY THE DEFENSE WAIVED.

11:02 THE COURT CHARGED THE JURY, AND THE JURY WENT INTO DELIBERATION

2:35 THE JURY RETURNED WITH A VERDICT OF GUILTY AS CHARGED.
(1st DEGREE MURDER)

3:00 THE COURT TOOK UP THE SENTENCING PORTION OF THE TRIAL.

STATE WITNESSES:
PETER THOMAS

STATE EXHIBITS:
S 1 ACTS OF CONGRESS
S 2 CHARGES FROM THE STATE OF ARKANSAS

DEFENSE WITNESSES:
GLENDA WHITE
GLEN SMITH

THE STATE & DEFENSE RESTED.

5:05 THE JURY RETURNED WITH A VERDICT RECOMMENDATING (sic) THE DEATH PENALTY BE ENFORCED.

STATE OF LOUISIANA, PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana
vs.
Robert Sawyer

No. 79-2841
Division G
Date 10-16-80

DISTRICT ATTORNEY BOUDOUESQUE
JUDGE GAUDIN

THE DEFENDANT ROBERT W. SAWYER APPEARED BEFORE THE BAR OF THE COURT THIS DAY FOR HEARING ON A MOTION FOR A NEW TRIAL, REPRESENTED BY JAMES WEIDNER, ATTORNEY. MOTION AS TAKEN UP, MOTION DENIED BY THE COURT, THE DEFENDANT WAIVED DELAYS AND SENTENCING HAVING EXECUTED ALL FURTHER DELAYS THE COURT SENTENCED THE DEFENDANT TO DEATH, AND THE DEFENDANT IS COMMITTED TO THE LOUISIANA DEPARTMENT OF CORRECTION FOR THE EXECUTION OF SAID SENTENCE IN CONFORMITY WITH L.S.A.-R.S. 15:824.

THE DEFENCE ATTORNEY ORALLY ADVISED THE COURT OF HIS INTENTIONS OF FILING FOR AN APPEAL. THE DEFENDANT IS REMANDED TO THE PARISH PRISON FOR TRANSPORTATION. THE DEFENDANT GAVE HIS DATE OF BIRTH.

DATE OF BIRTH AS 8-10-50 AND HIS AGE AS 30 YEARS OLD.

/s/ Grady Lewis
Deputy Clerk

NOTICE OF APPEAL

THE STATE OF LOUISIANA	TWENTY-FOURTH JUDICIAL DISTRICT COURT
VS.	
ROBERT SAWYER	PARISH OF JEFFERSON
File Number 79-2841 DIVISION "G" NO. 248	STATE OF LOUISIANA H. Charles Gaudin Judge Presiding

NOTICE is hereby given that on MARCH 31, 1981, upon motion of Defense Attorney ROBERT T. GARRITY, JR., in the above numbered and entitled cause, an order of appeal was entered granting a Criminal Appeal returnable on the 1ST day of JUNE, 1981.

Clerk's office, Gretna, Louisiana, this 7th day of April, 1981.

/s/ Genny Venette
DEPUTY CLERK OF COURT

STATE of Louisiana

v.

Robert SAWYER

No. 81-KA-1566

Supreme Court of Louisiana

Oct. 18, 1982

Rehearing Denied Nov. 24, 19

LEMMON, Justice.

This is an appeal from a conviction of first degree murder and a sentence of death. The principal issue on review of the guilt phase of the trial is the sufficiency of the evidence of aggravated arson as an essential element of the offense. R.S. 14:30. The principal issues on review of the penalty phase involve (1) admission into evidence of defendant's indictment for second degree murder in an unrelated incident and his subsequent plea to involuntary manslaughter, (2) the sufficiency of the evidence supporting the aggravating circumstances found by the jury, and (3) the prosecutor's closing argument.

Facts

A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.[1]

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed the Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.[2]

---

[1] Whether Ms. Shano stayed out all night with defendant or returned home earlier during the evening was the subject of conflicting testimony. That dispute, however, is not critical to the resolution of any significant factual or legal issue in the case.

[2] One of the doctors described the cause of her death as "metabolic exhaustion" resulting from severe blows to her head and incredibly severe (third degree) burns over more than one-third of her body.

After the original altercation during Ms. Shano's absence, defendant and Lane, for some unexplained reason, decided that Ms. Arwood needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or ever revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists.[3] A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms.

---

[3] She was probably also forced to engage in sexual intercourse with Lane during a brief period when Lane was left to guard her while defendant was boiling water in the kitchen to scald her. Although the record does not necessarily support an inference that she was raped at that point in time, this is not fatal to either the conviction or the sentence, as will be discussed later.

Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane "just how cruel he (defendant) could be". When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.[4]

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ("They've killed Fran and they're trying to kill me") were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. The also saw defendant sitting with his feet propped up on the edge of the couch.

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[4] Ms. Shano testified that Lane told her his sex organ had been burned when defendant ignited the lighter fluid while he was having intercourse with the (unconscious) victim. She further testified that defendant then told Lane "Nobody told you to stay inside of her while I told you I would show you how hot pussy can get".

There were also burn marks on the new sheets on the sofa bed as a result of the incident, and defendant's fingerprints were found on a can of lighter fluid.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died.

The grand jury indicted both men for first degree murder. Lane was convicted in a separate trial and sentenced to life imprisonment.[5] Defendant was convicted and sentenced to death.

Review of Guilt Phase

Defendant contends the evidence was insufficient to establish the essential elements of first degree murder.

R.S. 14:30, defining first degree murder, at the time of the offense provided in pertinent part:

> "First degree murder is the killing of a human being:
>
> "(1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of . . . aggravated arson . . . ;"

Although defendant presented the testimony of laymen and psychiatrists regarding his allegedly intoxicated condition and its effect on his ability to form a specific intent to kill or inflict great bodily harm, the jury reasonably rejected the defense. There was ample evidence from the testimony of the arresting officer and Ms. Shano

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[5] His conviction was affirmed by this court. See *State v. Lane*, 414 So.2d 1223 (La. 1982).

from which a rational juror could have found that defendant acted with specific intent, despite his excessive consumption of alcohol.

There was also ample evidence from which a rational juror could have concluded beyond a reasonable doubt that defendant was engaged in the perpetration of aggravated arson.[6] His act of igniting a flammable liquid, after pouring it onto the bed sheet (a movable) and the body of a helpless human being, certainly created a foreseeable risk of endangering human life. (This act also evidenced the specific intent to inflict great bodily harm.) The resulting flames set fire to the sheet and produced severe burns on the victim's body.[7] Thus, the evidence was

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[6] R.S. 14:51 defines aggravated arson as follows:

> "Aggravated arson is the intentional damaging by any explosive substance or the setting fire to any structure, watercraft, or movable whereby it is foreseeable that human life might be endangered."

[7] We need not decide in this case whether merely setting fire to a flammable liquid, after pouring it over the body of an unconscious human being, constitutes aggravated arson. In this case the element of setting fire to a movable was satisfied by the burning of the bed sheet (as proved by the photographs of the sheet showing holes with charred edges, rather than mere scorching or blackening as defendant argues). We also note that in *Lane* this court referred, in another context, to the burning of the sheet as satisfying that essential element of the offense, as follows:

> "The record reflects testimony of lighter fluid being poured on the victim and on surrounding sheets and sofa bed. The victim was then set on fire, as was the bedding around her. Lighter fluid is an explosive substance. There is no doubt that these acts were intentional and it was surely foreseeable that Frances

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plainly sufficient to support the conviction.[8] See *State v. Lane*, above; *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979). *Additional Facts in Penalty Phase*

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> Arwood's life would be endangered by such acts. The trial judge reasoned that the fabric around the victim and the sofa bed could certainly be considered movables within the meaning of the statute. In our opinion, the trial judge was correct in charging the jury as to the definition of aggravated arson." 414 So.2d at 1228.

The setting fire to a flammable liquid, after placing the liquid in close proximity to a human body, obviously creates the foreseeable risk of great harm. Arguably, such an act constitutes aggravated arson under R.S. 14:51, because of the setting fire to the flammable liquid, which is a movable, even if no other movable is burned.

Under statutes defining arson in terms of the burning of dwellings (at common law, arson was an offense against habitation), it was logical for courts to reason that the mere setting fire to "kindling" for the purpose of burning a house was not arson, unless the house *itself* was burned. See R. Perkins, *Criminal Law*, Ch. 3, § 2B and C (2d ed. 1969). However, when a statute (such as R.S. 14:51) is extremely broad with respect to the nature of the "thing" set afire, and the statute's focus is primarily on the creation of foreseeable risk of great harm to humans, the igniting of "kindling" or lighter fluid for the purpose of engulfing a human body (or part of a human body) in flames might suffice – as long as the endangerment element is satisfied.

Nevertheless, as stated above, resolution of that question is not required here, because defendant did set fire to bedclothes by pouring lighter fluid and igniting it, and that act endangered the victim's life.

[8] The evidence was sufficient to support the conviction because of the jury's supported finding as to the commission of

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At the sentencing hearing, both the state and defendant offered additional evidence.

Over defense objection, the state called a deputy prosecutor from Arkansas to present documentary evidence establishing the circumstances of defendant's prior indictment for second degree murder in the killing of a four-year-old child and his eventual plea to involuntary manslaughter. The records also revealed that the trial court was presented with the facts of the incident before accepting defendant's plea of guilty to involuntary manslaughter and sentencing him to serve three years in

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the offense of aggravated arson, and it is unnecessary to determine whether the evidence also established beyond a reasonable doubt that defendant was a principal to the offense of aggravated rape. Significantly, the jury found (in enumerating the aggravating circumstances after the penalty hearing) that defendant was engaged at the time of the killing in the commission of an aggravated arson (and not of an aggravated rape).

There was no error, however, in the trial judge's instructing the jury regarding the elements of aggravated rape. The evidence justified an instruction on the essential elements of the offense, and the jury was capable of drawing reasonable inferences from the evidence based on the trial court's instructions.

Finally, the prosecutor's mention in closing argument (without contemporaneous objection) that there were two rapes, one of which was proved by the fact that Lane was alone in the bathroom with the victim for 10 to 20 minutes, was certainly not sufficiently prejudicial to warrant a reversal of the conviction.

prison.[9] Defendant was released on parole after one year and successfully completed his parole.

Defendant and his older sister both testified about defendant's unhappy childhood. Defendant's mother committed suicide shortly after the birth of defendant and a twin sister, when the older sister was only four years old. The circumstances forced the family to separate, and, according to defendant's sister, his father seemed to blame defendant for the family woes. He was extremely harsh and brutal with defendant.[10] As a child,

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[9] According to the facts contained in the record, the young victim, who was the daughter of a woman with whom defendant was living, had been left in defendant's care while her mother went to work. Defendant brought the child to the emergency room of the hospital to be treated for injuries, which eventually resulted in her death. The medical evidence indicated that the child received a severe blow to the head. Further examination revealed bruises, scars and burn marks suggesting that the little girl had been the victim of earlier physical abuse.

The Arkansas prosecutor eventually accepted defendant's plea that the killing was committed "without malice" and without an intent to "produce death". See Section 41-2209, Arkansas Criminal Code. Defendant claimed that he was trying to discipline the child (who was allegedly "playing in her food") when the child's highchair fell over, causing her to hit her head on the concrete floor.

[10] One incident related by defendant's older sister described the frustration he faced as a child. His grandfather had given defendant a calf to raise. His father persuaded defendant to let him sell the calf to raise funds for the farming operation, agreeing to allow defendant to participate in a ball game in town. When the day of the eagerly awaited game arrived, the father refused to drive the boy to town, and defendant, then a preteen child, walked and hitchhiked the eight miles to the town. Upon his return, his father brutally beat him for acting contrary to his wishes.

defendant was faced with long hours of hard work on his father's Tennessee farm. He received few rewards or gratifications for his labors, either in terms of parental words or actions reflecting praise and affection, or in opportunities for traditional childhood activities.

Understandably, defendant began to run away at an early age. He was eventually institutionalized, but ran away from the state mental health facility. He lived with various relatives until he was about 17, when he left to begin a series of riverboat jobs.

Defendant also gave his version of the events leading to his prior conviction for involuntary manslaughter. In response to defendant's professions of accident and of love and affection for the child, the prosecutor cross-examined him about the cause of various injuries on the child's body and about a statement he gave to police admitting that he had whipped the child.

Despite the evidence offered in mitigation, the jury recommended the death penalty, relying on three aggravating circumstances: (1) that defendant was engaged in the commission of aggravated arson, (2) that the offense was committed in an especially cruel, atrocious and heinous manner, and (3) that defendant had previously been convicted of an unrelated murder.

Review of Penalty Phase

Because the jury recommended the death penalty, this court must review the record to determine that the prosecutor and the trial court adhered to the procedural

protections outlined by the Legislature and that the sentence is not excessive. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859 (1976). In reviewing a death sentence, we are required by Supreme Court Rule 28 to consider:

> (a) whether the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors, and
>
> (b) whether the evidence supports the jury's finding of a statutory aggravating circumstance, and
>
> (c) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Sufficiency of Evidence of Statutory Aggravating Circumstances

C.Cr.P. Art. 905.3 requires that the jury find beyond a reasonable doubt the existence of at least one of the statutory aggravating circumstances listed in C.Cr.P. Art. 905.4 before the jury can even consider recommendation of the death sentence. And Supreme Court Rule 28, § 1(b) requires that this court, on review for excessiveness, determine that the jury's finding was supported by the evidence.

The jury found the existence of three statutory aggravating circumstances. The evidence is clearly sufficient, as discussed earlier, to support the jury's finding with respect to the commission of an aggravated arson. The evidence also supports the jury's finding that the offense

was committed in an especially cruel, atrocious and heinous manner.[11]

Defendant argues, however, that every aggravating circumstance found by the jury must be supported by the evidence and that the evidence does not support a finding that defendant was previously convicted of an unrelated murder. See *State v. Monroe*, 397 So.2d 1258 (La. 1981). The last portion of defendant's argument is correct, in that a finding of a conviction for an unrelated murder is not supported by a record which reflects only a conviction for involuntary manslaughter. *State v. Culberth*, 390 So.2d 847 (La. 1980). However, C.Cr.P. Art. 905.3 only requires that the jury find the existence of one aggravating circumstance in order to consider recommending a sentence of death.

This court has upheld death sentences when only one of several aggravating circumstances found by the jury was supported by the evidence (as long as defendant was not unduly prejudiced by failure to comply with procedural safeguards or by the influence of arbitrary factors during the penalty phase, and as long as the death sentence was not otherwise excessive). *State v. Martin*, 376

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[11] This court has construed this provision to include only those homicides in which the victim was subjected to "serious physical abuse . . . before death". *State v. Sonnier*, 402 So.2d 650, at 659 (La. 1981). Thus, only in those cases in which the offender tortured or pitilessly inflicted unnecessary pain on the victim has this court held that this aggravating circumstances was supported by the evidence. See *State v. Baldwin*, 388 So.2d 664 (La. 1980). See also *State v. Culberth*, 390 So.2d 847 (La. 1980). The record in this case overwhelmingly supports such a finding.

So.2d 300 (La. 1979), cert. denied, 449 U.S. 998, 101 S.Ct. 540, 66 L.Ed.2d 297; *State v. Monroe*, above.[12] The adequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenders properly exposed to the possibility of the death sentence.[13] See *Williams v. Maggio*, 679 F.2d 381 (5th Cir. 1982) (en banc).

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[12] At the time of this offense (although not at the time of the crime in the *Martin* and *Monroe* decisions), R.S. 14:30 required, as an essential element of first degree murder, the existence of at least one of four enumerated aggravating circumstances, which were also among the statutory aggravating circumstances listed in C.Cr.P. Art. 905.4. Therefore, under the present law the class of murderers for which the death penalty is potentially available has already been narrowed by the additional elements now necessary for a conviction of first degree murder, and a supported verdict of guilty of first degree murder in the guilt phase of the trial automatically fulfills the threshold requirement of a finding of at leas one statutory aggravating circumstances, thereby authorizing the jury to consider imposing the death penalty. The penalty phase now serves primarily to afford an opportunity for the prosecution to offer proof of additional aggravating circumstances and for the defense to offer proof of mitigating circumstances.

[13] In *Zant v. Stephens*, ___ U.S. ___, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), the United States Supreme Court (after the death sentence was reversed by a three-judge panel of the Fifth Circuit) remanded to the Supreme Court of Georgia for certification of the question of the state law premises that support the validity of the death sentence when one of the statutory aggravating circumstances found by the jury was constitutionally invalid. The present case, unlike *Stephens*, does not involve a facially unconstitutional aggravating circumstance. Moreover, C.Cr.P. Art. 905.3 is the state law basis in Louisiana for the jury's consideration of imposition of the death penalty

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Thus, under Louisiana's statutory scheme, the jury at the penalty trial must in effect make two separate but closely related findings in order to recommend a death sentence. The jury must first find the existence of *at least one* statutory aggravating circumstance as a threshold requirement before even considering imposition of the death penalty. If an aggravating circumstance is found, then the jury must take into account any mitigating circumstances and must make a separate finding regarding whether the death penalty should be imposed, *considering both the particular crime and the particular offender.* If the jury recommends the death penalty, this court must review *each* of the two separate jury findings.

Here, the supported finding of the commission of aggravated arson fulfilled the requirement of C.Cr.P. Art. 905.3 and the review requirement of Supreme Court Rule

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when only one statutory aggravating circumstance found by the jury is supported by the evidence.

Finally, the use of statutory aggravating circumstances, which was approved in *Gregg v. Georgia,* above , as a method of channeling the jury's discretion in the determination of which first degree murderers are "death eligible", is particularly important in a capital sentencing scheme in which any intentional murder may be a capital offense. Unlike the Georgia statutory scheme (in which proof of a statutory aggravating circumstance in the penalty phase is a crucial consideration in the jury's determination of which first degree murderers should be punished by death), Louisiana's present capital sentencing procedure requires (as noted in Footnote 12) the finding of an aggravating circumstance in the guilt phase of the trial, and the class of murders for which the death penalty will even be considered by a jury has already been significantly narrowed by the Legislature as a method of guiding sentencing discretion. Under the present law, many first degree murders in Georgia would be second degree murders in Louisiana.

28, § 1(b) regarding a supported finding of the existence of at least one aggravating circumstance. The effect of a determination by this court that the evidence did not support the finding of an *additional* aggravating circumstance is a question which is more pertinent to the review of the jury's second finding – that is, the finding regarding the appropriateness of the death penalty for this particular crime and this particular murderer. We will address that question in the context of a discussion (in the next subsection) of whether evidence, which was offered in support of an unproved aggravating circumstance, introduced an arbitrary factor into the penalty phase which misdirected the jury's sentencing discretion.

Passion, Prejudice or other Arbitrary Factors.

The evidence offered in support of the unproved aggravating circumstance in this case consisted of the official records of the Arkansas circuit court and prison pertaining to defendant's conviction of involuntary manslaughter. Defendant objected to this evidence on the basis (1) that the documents were hearsay and were not properly authenticated and (2) that evidence of the indictment for second degree murder was inadmissible because only evidence of the conviction was admissible.

A review of the record reflects that the documents were properly certified and were also authenticated by the testimony of the deputy prosecuting attorney. They were identified as properly certified copies of original documents, which were official records of the circuit

court and of the Arkansas State Prison.[14] We therefore conclude that admission of the records was not barred by the lack of authenticity or by hearsay rules.[15]

Defendant's second ground for objection raises the question of what evidence is admissible in the penalty phase of the trial. C.Cr.P. Art. 905.2 declares that the hearing shall focus on the circumstances of the offense and propensities of the offender, but does not provide any specific rules regarding the admissibility of evidence at this unique type of hearing. At a sentencing hearing in a noncapital case (in which the judge will determine the sentence), many of the usual rules of evidence do not apply, because the postconviction focus on the appropriateness of sentence is vastly different from the preconviction focus of guilt or innocence. See *Williams v. New York*, 337 U.S. 241, 69 S.Ct. 1079, 93 L.Ed. 1337 (1949),

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[14] As this court said in *State v. Nicholas*, 359 So.2d 965 (La. 1978):

> "Generally, if an official writing is proved to come from the proper office where such documents are kept, the document will be authenticated as genuine by the certification of the custodian because of the presumption that he will carry out his duty to receive, record and certify only genuine official papers and reports." 359 So.2d at 969; see also 7 J. Wigmore, Treatise on Evidence §§ 2158-2159 (3d ed. revision 1940); McCormick, Law of Evidence § 224 (2d ed. 1972).

See also R.S. 15:457 and R.S. 15:529.1.

[15] Compare *State v. English*, 367 So.2d 815 (La. 1979), in which this court reversed a death sentence because the state failed properly to authenticate certain documents offered at the penalty trial.

which was cited in *Gregg* for the proposition that in "the determination of sentences, justice generally requires . . . that there be taken into account the circumstances of the offense together with the character and propensities of the offender". 428 U.S. at 189, 96 S.Ct. at 2932.

The instant case presents the question of whether evidence of a prior unrelated conviction of involuntary manslaughter (which clearly is relevant to a focus on the character and propensities of the offender) is admissible in the prosecution's case in chief, before the defendant takes the stand or otherwise puts his character at issue.[16] In *Jurek v. Texas*, 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976), the Court, although not specifically addressing the issue, approved a capital sentencing procedure in which any relevant evidence may be introduced in the penalty phase *after* the offender has been found guilty under a statute (similar to Louisiana's present statute) which defines first degree murder to require the finding of an enumerated aggravating circumstance as an essential element of the offense.[17] The Court did not discuss the

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[16] The usual prohibition against a jury's hearing evidence of other crimes, when such evidence tends merely to show a defendant's bad character, is not applicable in the penalty phase of a capital trial, because (unlike the guilt phase) the inquiry is designed to focus on defendant's character.

[17] In *Jurek*, the court noted:

> "While Texas has not adopted a list of statutory aggravating circumstances the existence of which can justify the imposition of the death penalty as have Georgia and Florida, its action in narrowing the

scope of evidence admissible in the penalty phase, but relevance obviously cannot be the sole criteria for determining admissibility. It is logical that the offered proof should also conform to the other *applicable* rules of evidence and that procedural safeguards for fairness (such as notice) must be considered in determining admissibility.

We will not attempt in this decision to lay down detailed rules for admissibility of evidence in the penalty phase, but will address the issue only insofar as it is necessary to decide this case.

We hold that the evidence of the prior unrelated conviction of involuntary manslaughter was properly admitted, although the conviction did not qualify as an unrelated murder under C.Cr.P. Art. 905.4(c) and although defendant did not take any steps to place his character at issue. In the penalty phase of a capital case, the defendant's character is at issue and indeed *is* one of

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categories of murders for which a death sentence may ever be imposed serves much the same purpose.* * So far as consideration of aggravating circumstances is concerned, therefore, the principal difference between Texas and the other two States is that the death penalty is an available sentencing option – even potentially – for a smaller class of murders in Texas. Otherwise the statutes are similar. Each requires the sentencing authority to focus on the particularized nature of the crime."

the principal issues.[18] In this particular case, the evidence of the prior conviction not only was extremely relevant, but also was competent and highly reliable. Moreover, defendant was apparently prepared to meet the evidence and in fact did so with testimony rebutting or explaining the official record's factual statement which served as the basis for acceptance of the plea. We therefore conclude that the evidence of the conviction was properly admitted and did not constitute an arbitrary factor which improperly influenced the jury's sentencing discretion.

As to the evidence of an initial indictment for second degree murder (in the same incident), there was extensive testimony from both defendant and his sister concerning defendant's version of the incident. Even if the fact of an indictment for a greater offense (than the one to which defendant eventually pleaded) should have been excluded, the gravamen of the evidence was a presentation of the facts of the occurrence, and admission of the indictment was certainly not reversible error.

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[18] The prosecution arguably should be allowed to affirmatively negate the mitigating circumstances that defendant "has no significant prior history of criminal activity". C.Cr.P. Art. 905-5(a). If the prosecutor cannot introduce evidence of prior convictions in the case in chief during the penalty hearing, and the defendant introduces no character evidence, then the jury might be misled into believing that the existence of the mitigating circumstances has been proved by the absence of evidence.

Although the penalty hearing is to be conducted according to the *applicable* rules of evidence, the usual prohibition against the prosecution's initiation of the inquiry into defendant's character is simply not applicable in the penalty phase, where the focus on character is one of the statutory means of channeling the jury's sentencing discretion.

There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. *State v. Willie*, 410 So.2d 1019 (La.1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases (decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See *State v. Lindsey*, 404 So.2d 466 (La.1981), and *State v. Willie*, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence him to the "living death of life imprisonment", which implied that defendant could never be released.[19] Had the prosecutor done

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[19] The only reference in closing argument to the possibility of pardon was:

> "The statute speaks without benefit of probation, suspension, commutation of sentence. The statute does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it related to Robert Sawyer because it's not."

more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of inappropriate considerations.[20]

We also note that the prosecutor commented on Lane's conviction and sentence to life imprisonment. In response to defense counsel's beyond-the-record comment that Lane was sentenced to life (a fact not previously revealed to the jury) and to the suggestion that defendant should receive the same sentence, the prosecutor retorted by arguing (also beyond the record) that he had handled Lane's case and that there were aggravating circumstances present in defendant's case which were not present in Lane's case.

A strong admonition by the trial court, in which he instructed the jury not to consider the comments of either

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[20] Prosecutors tread on dangerous ground by mentioning the availability of pardon. Even though such a remark is accurate, it has little relevance to the penalty determination, except to give the jury a complete picture of the overall scheme for punishing first degree murderers (and perhaps to correct inaccurate defense statements or implications that a murderer under sentence of life imprisonment can never be released from prison).

counsel regarding Lane's case, effectively prevented prejudice. The jury was clearly given the impression that defendant's case must be evaluated on its own merits, without regard to the sentence imposed on his original co-defendant.

Proportionality and Excessiveness of Sentence

Section 1, subsection (c) of Rule 28 requires this court to extend its review beyond the evidence submitted to the jury. We must, in effect, decide whether the jury's recommendation of the death sentence was disproportionate, reviewing both the facts presented to the jury and the other materials submitted to us on review. We must consider the recommendations of juries in similar cases (from the judicial district), as well as the character of the defendant and the nature of his crime.

This is the sixth death sentence recommended by a jury in Jefferson Parish since 1976. It is only the third death sentence from that parish which we have upheld.[21] In one other case of a death sentence, we remanded for

[21] In *State v. Berry*, 391 So.2d 406 (La.1980), we affirmed a recommended death sentence in a Jefferson Parish case in which the murderer intentionally killed a deputy sheriff during an aborted bank robbery. And in *State v. Johnny Taylor*, 442 So.2d 109 (La.1982), decided this day, we affirmed the death sentence in a case in which the murderer lured the victim from his home at night on the pretext of buying the victim's used automobile, stabbed the victim 20 times, and locked him alive in the trunk of the car, where he was left to die.

further evidentiary determinations.[22] In another, we remanded for a new penalty trial due to procedural flaws in the initial proceedings.[23] In one other case, the death penalty was set aside because of improper closing argument.[24]

As required by our rules, the district attorney has submitted information concerning all first degree murder prosecutions, including a brief description of the offense, the offender, and the disposition. A review of those cases illustrates the adage that no two cases are alike. (A brief description of each is included as part of an unpublished appendix.) In some, offenders, while engaged in robberies or burglaries, killed their victims or others who interrupted the commission of their crimes. In others, offenders killed out of anger at or hatred for the victim. In two cases, women were convicted for their part in schemes to kill their spouses.

The only thing which seems clear from a review of the cases presented to Jefferson Parish jurors is that they appear to recommend death in relatively few cases and only in those of an egregious nature. Certainly this case fits that description. Never before has this court has presented on appeal of a death sentence with such callous indifference to human suffering as was displayed here. After administering a savage beating, defendant sat comfortably listening to records, while his tormented victim lay dying before his eyes. Although defendant attempted to show that Lane was the principal aggressor, the jury

[22] See *State v. Smith*, 400 So.2d 587 (La.1981).

[23] See *State v. Lindsey*, 404 So.2d 466 (La.1981).

[24] *State v. Jimmy Robinson*, 421 So.2d 229 (La.1982).

obviously credited Ms. Shano's account which placed primary emphasis on defendant's role in Ms. Arwood's excruciatingly painful and lengthy ordeal. The jury obviously believed that he was principally responsible for urging Lane to participate in killing a woman who was virtually a perfect stranger to Lane.

Moreover, the superficial disparity between the sentences imposed on Lane and on defendant quickly disappears when one evaluates the culpability of the two men in this incident, as well as their individual backgrounds. Neither of the two juries, which separately heard the cases and made the recommendations, acted unreasonably. Two participants in the same murder can easily be viewed very differently for penalty purposes.[25]

This murderer, a mature man of almost 30, was not under the domination of any other human being, nor did he play a minor role in the brutal slaying. Furthermore, unlike Lane, he had previously killed a helpless, weaker human being. His case is easily distinguishable from Lane's.

Defendant's only endeavor to present factors in mitigation was his presentation of his own version of the

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[25] See, for example, the cases involving the two Sonnier brothers, in which they kidnapped and murdered a young couple after raping the girl. This court eventually affirmed the death sentence for the older brother, who had a serious criminal record. See *State v. Sonnier*, 402 So.2d 650 (La.1981). However, this court concluded death was excessive for the younger brother, who acted under the influence and domination of his older brother and whose role in their crime was "relatively minor". See *State v. Sonnier*, 380 So.2d 1 (La.1979).

child's death and his heartrending account of a pitiful, deprived childhood. While the factors were properly considered by the jury and must be considered on appeal, they pale into insignificance when faced with the horrendous offense committed against a helpless young woman.

The value which society places on human life has led the Legislature to enact severe penalties for the unjustified killing of a human being. That same concern for the intrinsic worth of the life of the accused has also led courts and legislatures to erect carefully designed procedures which must be scrupulously followed before an accused's life may be taken by the state for his crime.

This court's function in reviewing a death penalty recommendation by a jury is not to sit as a subsequent sentencing panel, but to insure that the jury's recommendation was not influenced by arbitrary factors or improper considerations. The jury in this case was unanimously convinced beyond a reasonable doubt that defendant committed first degree murder and that the circumstances warranted the imposition of the maximum penalty which may be imposed. We are convinced, on review of the record, that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning that recommendation on appeal.

Accordingly, defendant's conviction and sentence are affirmed.

DIXON, C.J. and DENNIS, J., concur with reasons.

CALOGERO, J., concurs for reasons assigned by DIXON, C.J.

DIXON, Chief Justice (concurring).

I respectfully concur.

C.Cr.P. 905.2 is ambiguous. We should not interpret it to permit the introduction of "character and propensit[y]" evidence except "according to the rules of evidence." C.Cr.P. 905.2. Here, however, the error of permitting evidence of bad character before character is placed at issue by defendant was harmless beyond reasonable doubt.

DENNIS, Justice, concurring in the result.

I concur in the result but strenuously disagree with the majority's unabashed disregard of the law and rules of evidence governing capital sentence hearings.

Code of Criminal Procedure article 905.2 clearly provides that "[t]he hearing shall be conducted according to the rules of evidence" and that "[e]vidence relative to aggravating or mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue." This plainly indicates that, except for evidence relative to aggravating and mitigating circumstances, the introduction of character evidence is governed by the rules of evidence, including the statutory rules set forth by R.S. 15:479-83. Of these R.S. 15:481 and 483 are most pertinent here: § 481 "The state is permitted to introduce testimony of the bad character of the accused only in rebuttal of the evidence introduced by him to show good character." § 483 "No other investigation into the character of a witness is permissible except such as affects his credibility." These rules plainly state that a defendant's character cannot be attacked until he puts it at issue by

the introduction of good character evidence or by taking the witness stand. Our law contains also a great many jurisprudential rules, not the least important of which are the rules adopted by this court in *State v. Prieur* 277 So.2d 126 (La.1973), to guarantee due process of law and relevance in the introduction of other crimes evidence.

The majority is completely wrong in stating that art. 905.2 does not provide any specific rules regarding the admissibility of evidence at a capital sentence hearing. Art. 905.2 clearly states that the hearing shall be conducted according to the "rules of evidence" which obviously include those laws previously enacted by the legislature and probably encompass those rules previously adopted by this court. As any evidence scholar knows, the legislature has not yet enacted a comprehensive evidence code and our body of that law is inadequate and unworkable without the jurisprudentially developed rules.

In truth, the majority has ignored the sentencing procedure enacted by the legislature and is attempting to fashion a procedure more to its liking. Apparently, the majority prefers the procedure that was adopted by Texas as described by the Supreme Court in *Jurek v. Texas* 428 U.S. 262, 96 S.Ct. 2950, 49 L.Ed.2d 929 (1976). In a Jurek sentence proceeding, the jury is nearly always asked to make a finding on only one question not already answered at the guilt trial. That is, "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society." See Black, Capital Punishment, the Inevitability of Caprice and Mistake 115 (2d ed. 1981). When this is the crucial question, perhaps a wide-open-no-

holds-barred procedure, allowing any and all bad character evidence from the word go, is appropriate. But the Texas Jurek proceeding is quite different from the procedure established by Louisiana law under which the jury must find beyond a reasonable doubt that at least one statutory aggravating circumstance exists, and weigh against it any mitigating circumstances, before it may go on to unanimously recommend a sentence of death. Regardless of which procedure in our personal opinions is wiser, fairer, or more just, this court has no legitimate power to usurp the plenary will of the Legislature and reshape the statutory system according to its own specifications.

I find it quite disturbing also that the majority seeks to support its disregard of the law and rules of evidence by implying that there is no essential difference between a capital sentencing by a jury and a noncapital sentencing by a judge. Is the majority implying that this court considers the solemn protections with which the legislature earnestly has surrounded the imposition of our most severe penalty to be meaningless technicalities? That "many of the usual rules of evidence do not apply" even though the Legislature has said they must? If so, the majority's cavalier attitude toward the law enacted by the Legislature and the extremity and permanence of capital punishment is appalling.

The majority opinion is very unclear as to what "procedural safeguards . . . (such as notice)" will be required in penalty hearings. See p. 103. It is hoped that the majority intends to apply the Prieur guidelines to capital punishment proceedings. It would seem that in the sentencing phase of a capital case most of all, a defendant is

entitled to notice, fairness and due process and should not lose his life because of surprise or the lack of a fair opportunity to meet the evidence against him. Yet, the majority has said in footnote 16 that the "usual prohibition" against other crimes evidence is "not applicable in the penalty phase of a capital trial." Its reference on page 103 to the "*applicable* rules of evidence" is robbed of any meaning by the rest of the opinion which seems dedicated to doing away with rules of evidence in sentencing hearings.

In my opinion, the character of the defendant is not generally at issue ab initio in a capital sentencing hearing. Evidence relevant to an aggravating or mitigating circumstance is admissible throughout the proceeding. Unless it fits within this category, however, bad character evidence, including other crimes evidence, is admissible against the defendant only according to the rules of evidence. The opening sentence of C.Cr.P. art. 905.2, which states that the sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender does not vitiate the meaning of the great number of detailed provisions which follow it. "Focus," when used as a verb means to concentrate or to converge. The introductory statement that the hearing shall concentrate on the defendant's character among other matters is not equivalent to saying that all character evidence shall be admissible. The remaining provisions of Art. 905.2 et seq. tell exactly how the hearing shall focus or concentrate on its subjects, and basically that is by following the rules of evidence, except that the introduction of all evidence relevant to aggravating or mitigating circumstances is permitted.

Additionally, I do not consider myself bound by any of the footnotes in the majority opinion. *Footnotes numbers 12* and *13* particularly appear to be entirely unnecessary and seem to reach out to decide issues not before us. The statement that the finding of guilt "automatically" constitutes a finding of an aggravating circumstance in the penalty hearing is contrary to law. The jury must independently find at least one aggravating circumstance *during the sentence hearing* before it may consider the death penalty. C.Cr.P. art. 905.3. The elliptic statements regarding: *Zant v. Stephens*, ___ U.S. ___, 102 S.Ct. 1856, 72 L.Ed.2d 222 (1982), and its possible relationship to our law are unclear, unwise, and unnecessary. *Footnote Number 16* is an outright perversion of the law. It flatly states that the prohibition against other crimes evidence is not applicable in a penalty phase. Again, C.Cr.P. art. 905.2 clearly indicates to the contrary. It says that evidence relative to aggravating and mitigating circumstances shall be relevant irrespective of whether the defendant places his character at issue, which clearly indicates that outside this exception, the state cannot introduce such evidence until the defendant places his character or credibility at issue "according to the rules of evidence." *Id.*

Nonetheless, I concur in the result. I agree with the Chief Justice that the errors in introducing the bad character evidence were harmless beyond a reasonable doubt. I also concur only in the result for the additional reasons that I find the conviction of guilt be supportable on a different basis than the majority and consider that another error in the penalty phase was also harmless error.

The first degree murder conviction is justified by the evidence which in my opinion proves that the defendant was a principal to the perpetration of aggravated rape during the criminal transaction.

The death penalty is warranted because the offense was committed in an especially heinous, atrocious, or cruel manner. Although I am uncertain that the evidence supports a finding that the offender was engaged in the perpetration of aggravated arson, and I am troubled by the jury's failure to find the perpetration or attempted perpetration of aggravated rape as an aggravating circumstance, I ultimately conclude that any error committed by the jury during the penalty hearing was harmless. This crime was so horrible and involved such pitiless and needless torture of the victim that I am convinced beyond a reasonable doubt that the jury would have recommended the death penalty even if it had been informed that the evidence was insufficient to justify findings that the offender was engaged in the perpetration of aggravated arson or had previously been convicted of an unrelated murder.

I agree with the majority's statement at p. 106 of its opinion that this court does not sit as a subsequent sentencing panel. But a word of caution is necessary. By this, we do not mean that we have abandoned our constitutional function of reviewing death sentences to see if they constitute cruel, unusual or excessive punishment under the circumstances of the case. What is meant is that we do not formulate or impose sentences; we either affirm them or reverse them.

LEMMON, Justice, concurring in denial of rehearing.

On application for rehearing, defendant contends that the admission of evidence of nonstatutory aggravating circumstances violated his constitutional right by injecting arbitrary factors into the jury's exercise of sentencing discretion.

Evidence of defendant's prior conviction of involuntary manslaughter, although not constituting proof of a prior conviction of an unrelated murder, was admissible to prove the statutory aggravating circumstance that defendant had a substantial past history of criminal activity. C.Cr.P. 905.4(c). Competent evidence of a criminal conviction is clearly admissible in this regard, and such evidence is highly relevant to the central focus of the sentencing hearing on the character and propensities of the offender. C.Cr.P. Art. 905.2.

Moreover, C.Cr.P. Art. 905.2's provision that the sentencing hearing "shall be conducted according to the rules of evidence" obviously refers to the *applicable* rules of evidence. While R.S. 15:481 and 483 would have been *applicable* to exclude evidence of defendant's character in the guilt phase of the trial, those statutes are simply not *applicable* rules of evidence in the sentencing phase. The purpose of R.S. 15:481 and 483 is to insure that a *conviction* is based on the accused's guilt, rather than on his bad character. But once guilt has been validly determined, the purpose of those statutes has been served, and the statutes should not be applied to exclude competent evidence of bad character, when the focus of the hearing itself puts the defendant's character at issue. C.Cr.P. Art. 905.2. See *Gregg v. Georgia*, 428 U.S. 153, 96 S.Ct. 2909, 49 L.Ed.2d 859, above.

STATE of Louisiana

v.

Robert SAWYER.

No. 81-KA-1566

Supreme Court of Louisiana.

Feb. 10, 1983.

In re: Robert Sawyer, applying for Stay of Execution, Parish of Jefferson, No. 79-2841.

ORDER

The foregoing motion considered:

IT IS ORDERED that Execution of Robert Sawyer by the State of Louisiana, the Department of Corrections, and any other Department, agent or servant of the State of Louisiana, presently set for March 8, 1983, be and the same is hereby stayed pending the timely filing and disposition of a petition for a writ of certiorari.

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463 U.S. 1223, 77 L.Ed.2d 1407

**Robert SAWYER, petitioner, v.
LOUISIANA. No. 82-6263.**

Case below, 422 So.2d 95; 427 So.2d 438.

July 6, 1983. On petition for writ of certiorari to the Supreme Court of Louisiana. The motion of petitioner for leave to proceed *in forma pauperis* and the petition for writ of certiorari are granted. The judgment is vacated and the case is remanded to the Supreme Court of Louisiana for further consideration in light of *Zant v. Stephens*, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

Opinion on remand, 442 So.2d 1136.

Supreme Court of Louisiana.

Robert SAWYER

v.

STATE of Louisiana.

No. 81-KA-1566.

Nov. 28, 1983.

Rehearing Denied Jan. 6, 1984.
Certiorari Denied April 2, 1984.
See 104 S.Ct. 1719.

BLANCHE, Justice.

Defendant was convicted of first degree murder and subsequently sentenced to death. The conviction and sentence were affirmed in *State v. Sawyer*, 422 So.2d 95 (La.1982). Defendant applied for a writ of certiorari to the United States Supreme Court, on the ground that evidence of another crime not considered a statutory aggravating circumstance was admitted at the sentencing, thereby injecting an arbitrary factor into the jury's decision making process. The Supreme Court, ___ U.S. ___, 103 S.Ct. 3567, 77 L.Ed.2d 1407 remanded the case to this court for consideration in light of the holding in *Zant v. Stephens*, ___ U.S. ___, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983).

FACTS

The gruesome and depraved facts surrounding this case were given a thorough treatment in the court's previous opinion. See *Sawyer*, 422 So.2d 95 (La.1983). Therefore, we give only a brief recitation of the circumstances

leading to defendant's conviction. On September 29, 1979, Fran Arwood was at the residence of defendant, where she was helping to care for the young children of defendant's live-in girlfriend. Defendant and a friend, Charles Lane, attacked Ms. Arwood, striking her repeatedly in the face. Thereafter, the two men proceeded to torture the victim by first dunking her body into scalding water, then beating her and ultimately, setting fire to the victim's genitalia with lighter fluid. The testimony of Ms. Shano at trial also indicated that, at some stage, the victim was raped. After this savage attack, defendant and Lane left the mortally wounded victim on the floor of the house until relatives of Ms. Shano arrived later in the day.

Both defendant and Lane were indicted for first degree murder. Lane was tried separately and sentenced to life imprisonment. *State v. Lane*, 414 So.2d 1223 (La. 1982). Defendant was convicted by a unanimous jury, which then proceeded to sentence defendant to death.

At the sentencing hearing, the State reoffered evidence presented in its case in chief to establish that defendant had murdered the victim while the perpetration of aggravated arson and aggravated rape, and that defendant had murdered the victim in an unusually cruel manner. Additionally, the State called a deputy prosecutor from Arkansas, who introduced documentary evidence that defendant had pled guilty to involuntary manslaughter of a four-year old child, and had served one year in prison as a result. Afterwards, defendant testified about the guilty plea and his version of the event leading to the child's death. Both defendant and his sister offered mitigating testimony as to defendant's brutal

childhood and one time institutionalization at a state mental health facility.

Upon hearing all the evidence, the jury announced its finding of three statutory aggravating circumstances: (1) that defendant was engaged in the perpetration of aggravated arson; (2) that the offense was committed in an especially heinous, atrocious and cruel manner; (3) that defendant was previously convicted of an unrelated murder and sentenced defendant to death. On appeal, this court found that the last aggravating circumstance was not supported by the evidence, 422 So.2d at 101, but correctly observed that only one aggravating circumstance need be found in order to place defendant in the category of offenders capable of receiving the death penalty. Defendant, however, argued that introduction of testimony relating to the manslaughter plea was improper, since it was neither admissible as an aggravating circumstance in the guilt phase of the trial, nor as other crimes evidence in the sentencing phase where defendant had not previously placed his character at issue. In upholding the admission of the testimony, this court found that Louisiana C.Cr.P. art. 905.2 allowed the evidence to be considered to show defendant's bad character, reasoning that defendant's character is put at issue by the nature of the proceeding, regardless of whether he takes the witness stand on his own behalf and places his character at issue.

ISSUE

On remand, we are asked to consider our previous holding in light of *Zant v. Stephens*, ___ U.S. ___, 103 S.Ct.

2733, 77 L.Ed.2d 235 (1983). In that case, the U.S. Supreme Court affirmed the constitutionality of a Georgia sentencing statute, finding that the invalidity of several aggravating circumstances found by the jury did not impair the death sentence in the case. Based upon our reading of Zant, we frame the following issues for resolution: (1) Under the Louisiana statutory scheme, does the finding of an additional aggravating circumstance that is later found invalid have any affect on the jury's sentence determination, where evidence of the invalid circumstance was otherwise admissible? (2) Was evidence of the invalid aggravating circumstance admissible in the instant case to show defendant's character, where defendant had not first placed his character at issue? (3) If inadmissible, was the evidence so consequential that it injected an arbitrary factor in the jury's decision to sentence defendant to death?

THE STATUTORY SCHEME

Louisiana's capital sentencing procedure, La.C.Cr.P. arts. 905-905.9, is similar in many respects to the Georgia procedure examined in *Zant*.[1] As in Georgia, the trial of

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[1] The Georgia sentencing procedure was explained in detail by the Georgia Supreme Court in response to the U.S. Supreme Court's certified question in *Zant*, 250 Ga. 97, 297 S.E.2d 1 (1982). Essentially, the Georgia System is divided into three planes:

> I. Ga.Code Ann. § 26-1101 separates those homicide cases which fall into the category of murder. This is an issue of fact determined during the guilt phase of the trial.

(Continued on following page)

an individual charged with first degree murder is bifurcated; consisting of a guilt phase and a penalty phase. During the guilt phase of the trial, the jury must make the initial determination whether the defendant belongs in the class of offenders who *may* be exposed to the death penalty. La.R.S. 14:30 provides that in addition to specific intent to kill a human being, the offense must include one of four aggravating circumstances.[2] Once the defendant

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> II. Ga.Code Ann. § 27-2534.1 provides that unless at least one aggravating circumstance is found, the death penalty may not be imposed in a given murder case.
>
> III. Once it is determined that the death penalty may be imposed, the fact finder determination takes into account all relevant evidence in mitigation or aggravation, and vests absolute discretion on the fact finder.

Superimposed on this scheme is the automatic appeal to the Georgia Supreme Court, who determines whether the penalty was imposed under the influence of passion, prejudice or other arbitrary factors.

[2] La.R.S. 14:30 states:

> First degree murder is the killing of a human being:
>
> (1) When the offender has specific intent to kill or to inflict great bodily harm and is engaged in the perpetration or attempted perpetration of aggravated kidnapping, aggravated escape, aggravated arson, aggravated rape, aggravated burglary, armed robbery, or simple robbery;

(Continued on following page)

has been found guilty, the jury must then determine whether defendant will be given the death sentence.

The process of sentencing is explained in Code of Criminal Procedure Art. 905.3, which states:

> A sentence of death shall not be imposed unless the jury finds beyond a reasonable doubt that *at least one statutory aggravating circumstance exists*, and, after consideration of any mitigating circumstances, recommends that the sentence of death be imposed.

Clearly, then, the sentencing phase is itself broken down into two aspects. Initially, the jury must find the existence of at least one statutory aggravating circumstances before an offender can be sentenced to death. Because the aggravating circumstances listed in Article 905.4 include most of the aggravating circumstances listed in R.S. 14:30, the jury will usually have already found at least one aggravating circumstance before it reaches the penalty phase of the trial. Louisiana's scheme differs from Georgia's in this respect, for the class of offenders in Louisiana eligible for

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(2) When the offender has a specific intent to kill or to inflict great bodily harm upon a fireman or peace officer engaged in the performance of his lawful duties;

(3) When the offender has a specific intent to kill or to inflict great bodily harm upon more than one person; or

(4) When the offender has specific intent to kill or inflict great bodily harm and has offered, has been offered, has given, or has received anything of value for the killing.

the death penalty is considerably narrower after the guilt phase of the trial.[3]

Once a *single* aggravating circumstance is found, the jury may then consider all the evidence, both in aggravation and mitigation, in order to make the final determination that the offender should be put to death. The finding of additional aggravating circumstances are therefore unnecessary to advance the case to consideration of whether the death penalty will in fact be imposed. Nothing in the statutory scheme requires that the jury weigh two or more aggravating circumstances more heavily against the defendant than a single aggravating circumstance. Rather, the finding of *statutory* aggravating circumstances is

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[3] Under the Ga.Code Ann., murder punishable by death is defined in the following manner:

§ 26-1101 Murder

(a) A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of a human being. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances capable of proof. Malice shall be implied where no considerable provocation appears, and where all the circumstances of the killing show an abandoned and malignant heart.

(b) A person also commits the crime of murder when in the commission of a felony he causes the death of another human being, irrespective of malice.

Clearly, then what is considered second degree murder in Louisiana would be considered murder in Georgia, subject to the death penalty.

simply a preliminary step before any balancing process can be undertaken.[4]

ADMISSIBILITY OF THE EVIDENCE

While the failure of an aggravating circumstance may not of itself impair the sentence, the introduction of otherwise inadmissible evidence in support of the circumstance could inject an arbitrary factor in the sentencing process. Defendant maintains in the instant case that inadmissible evidence was put before the jury in the form of testimony of the involuntary manslaughter conviction.

Defendant's argument is based on the language of C.Cr.P. art. 905.2, which addresses the conduction of sentencing hearings. The article provides:

> The sentencing hearing shall focus on the circumstances of the offense and the character and propensities of the offender. *The hearing shall be conducted according to the rules of evidence.* Evidence relative to aggravating or mitigating

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[4] Additional protection is afforded defendant by Rule 28 of the Louisiana Supreme Court, which provides for automatic review by this court to determine if the sentence is excessive. Included in this review are inquiries into whether:

> (1) the sentence was imposed under the influence of passion, prejudice or any other arbitrary factors; and
>
> (2) whether the evidence supports the jury's finding of a statutory aggravating circumstance; and
>
> (3) whether the sentence is disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

> circumstances shall be relevant irrespective of whether the defendant places his character at issue. Insofar as applicable, the procedure shall be the same as that provided for trial in the Code of Criminal Procedure. The jury may consider any evidence offered at the trial on the issue of guilt. The defendant may testify in his own behalf. In the event of retrial the defendant's testimony shall not be admissible except for purposes of impeachment.

Defendant contends that the second sentence of 905.2 precludes the introduction of other crimes evidence unless offered to show defendant's bad character, or to support a valid aggravating circumstance.[5] 905.4(c) limits

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[5] Article 905.4 provides that:

> The following shall be considered aggravating circumstances:
>
> (a) the offender was engaged in the perpetration or attempted perpetration of aggravated rape, aggravated kidnapping, aggravated burglary, aggravated arson, aggravated escape, armed robbery, or simple robbery;
>
> (b) the victim was a fireman or peace officer engaged in his lawful duties;
>
> (c) the offender was previously convicted of an unrelated murder, aggravated rape, or aggravated kidnapping or has a significant prior history of criminal activity;
>
> (d) the offender knowingly created a risk of death or great bodily harm to more than one person;
>
> (e) the offender offered or has been offered or has given or received anything of value for the commission of the offense;

(Continued on following page)

other crimes which may be considered aggravating circumstances to convictions of unrelated murders, aggravated rape, or aggravated kidnapping, or where the offender has a significant prior history of criminal activity. It does not include guilty pleas, or for that matter, convictions of involuntary manslaughter.[6] Accordingly, defendant argues that he has not placed his character at issue by taking the stand, evidence of the guilty plea cannot be introduced. As further support for this proposition, defendant points to the following sentence of 905.2 – which allows for other crimes evidence to be introduced

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(f) the offender at the time of the commission of the offense was imprisoned after sentence for the commission of an unrelated forcible felony;

(g) the offense was committed in an especially heinous, atrocious, or cruel manner; or

(h) the victim was a witness in a prosecution against the defendant, gave material assistance to the state in any investigation or prosecution of the defendant, or was an eye witness to a crime alleged to have been committed by the defendant or possessed other material evidence against the defendant.

(i) the victim was a correctional officer or any employee of the Louisiana Department of Corrections who, in the normal course of his employment was required to come in close contact with persons incarcerated in a state prison facility, and the victim was engaged in his lawful duties at the time of the offense.

[6] See *State v. Antonio James*, 431 So.2d 399 (La.1983) (Blanche, J., concurring in part and dissenting in part).

regardless of whether defendant has taken the stand if it relates to the aggravating circumstances – as a limited exception to the general rules of evidence by which the hearing should be guided.

This argument was espoused by defendant when the case was originally before this court, *State v. Sawyer*, 422 So.2d 95 (La.1982). We rejected the argument then, and most recently, in the case of *State v. Jordan*, 440 So.2d 716 (La.1983).[7] Now, after having been asked to reconsider the question, we affirm our prior holdings.

The first sentence of 905.2, which defendant ignores in his effort to expand the meaning of the second sentence, expresses the true intent of the statutory scheme. When it commands that the sentencing gearing focus on the "circumstances of the offense and the *character*[8] and propensities of the offender," 905.2 makes it clear that the character of the defendant is one of the two most relevant factors with which the sentencing hearing should be concerned. As we observed in *State v. Mattheson:*

> The above article clearly provides that the focus of the sentencing hearing is on "the character and propensities of the offender" as well as the circumstances of the offense and that evidence of "aggravating or mitigating circumstances" are relevant *irrespective* of whether defendant places his character at issue.

407 So.2d 1150, 1164 (La.1981). In *State v. Jordan*, we stated that "it is axiomatic that the conviction per se puts

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[7] The opinion was authored by Judge Julian Bailes, sitting for Justice Marcus.

[8] Emphasis added.

the convicted offender's character at issue" 440 So.2d 716, 720 (La.1983). At the heart of such a statement rests the underlying difference between the uses of character evidence at the guilt and sentencing phases of a trial. The rules of evidence prohibit the use of character evidence where defendant has not placed his character at issue for the simple reason that such evidence is not relevant to the issue of guilt. To the contrary, in a sentencing hearing, the jury is asked to scrutinize defendant's character, to ascertain whether the offender and the offense fit the statutory scheme for those whom the death penalty has been designed.

We are of the opinion that the reference to the rules of evidence contained in Article 905.2 was placed there to regulate the introduction of competent versus incompetent evidence, and should not be construed to prohibit introduction of highly relevant character evidence at the sentencing hearing.[9] Thus, we conclude that the evidence of defendant's guilty plea to involuntary manslaughter of a four-year old child was properly admitted to show defendant's character.

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[9] In a concurring opinion to *Jordan*, J. Lemmon noted the absurd result of applying the other crimes rule to a sentencing hearing:

> "It is therefore highly doubtful that the Legislature intended for the defendant to control the decision on which evidence of his character and propensities will be introduced at the penalty hearing. Yet this is exactly what the adoption of defendant's argument would permit." *State v. Jordan*, 440 So.2d 716, at 721 (La.1983) (Lemmon, J., concurring).

ARBITRARINESS

Although we find that the evidence was admissible under Article 905.2, and thus injected no arbitrary factor into the decision process of the jury, we think that even if the evidence had been inadmissible, no serious prejudice could have resulted to defendant. Defendant has argued strenuously in his brief that the prosecutor relied heavily on the details surrounding defendant's guilty plea to manslaughter to convince the jury to return a death sentence. Regardless of whatever emphasis the prosecutor placed on the guilty plea, it is inconceivable, given the overwhelming evidence of the heinous nature of the principal offense already before the jury, that the additional evidence of the manslaughter plea could have seriously prejudiced defendant at that point.

DECREE

For the reasons assigned, we find that the failure of one of three statutory aggravating circumstances did not create an arbitrary factor in the sentencing of defendant by allowing inadmissible evidence to be considered by the jury. Therefore, the sentence of defendant is affirmed.

AFFIRMED.

CALOGERO, J., concurs. See the concurring portion of my concurring/dissenting opinion in *State v. Jordan*, 440 So.2d at 722.

DENNIS, J., concurs with reasons.

DENNIS, Justice, concurring.

I concur in the result, but I adhere to the reasoning expressed in my concurring opinion on original review. See *State v. Sawyer*, 422 So.2d 95, 106 (La.1982).

In the Supreme Court
of the United States

Robert SAWYER, petitioner,

v.

LOUISIANA.

No. 83-6258

Former decision, 103 S.Ct. 3567.

Case below, 422 So.2d 95; 427 So.2d 438; 442 So.2d 1136.

Petition for writ of certiorari to the Supreme Court of Louisiana.

April 2, 1984. Denied.

Justice BRENNAN and Justice MARSHALL dissenting:

Adhering to our views that the death penalty is in all circumstances cruel and unusual punishment prohibited by the Eighth and Fourteenth Amendments, *Gregg v. Georgia*, 428 U.S. 153, 227, 231, 96 S.Ct. 2909, 2950, 2973, 49 L.Ed.2d 859 (1976), we would grant certiorari and vacate the death sentence in this case.

STATE OF LOUISIANA,
PARISH OF JEFFERSON

24th Judicial District Court

State of Louisiana	No. 79-2841
VS.	Division G
ROBERT SAWYER	Date 5-8-84

DISTRICT ATTORNEY_____ JUDGE TIEMANN

PETITION FOR WRIT OF HABEAS CORPUS IN ACCORDANCE WITH LOUISIANA SUPREME COURT RULE XXVII WAS FILED IN OPEN COURT. HAVING EXAMINED THE FOREGOING PETITION FOR POST-CONVICTION RELIEF, WRIT OF HABEAS CORPUS, EVIDENTIARY HEARING AND STAY OF EXECUTION, THE COURT DENIED THE PETITION AND STAY OF EXECUTION.

/s/ Kathy Wright
DEPUTY CLERK

Supreme Court of Louisiana.

**STATE of Louisiana ex rel.
Robert SAWYER**

v.

**Ross MAGGIO, Jr., Warden, Louisiana
State Penitentiary.**

No. 84-KP-0919.

May 10, 1984.

In re Robert Sawyer, applying for writ of review and stay of execution to the Twenty-Fourth Judicial District Court, Parish of Jefferson, No. 79-2841, Division G.

In view of the fact that counsel assigned by the trial judge in this capital case was not admitted to the bar for at least five years prior to trial as required by La.Code Crim.P. art. 512 and considering defendant's contentions relative to ineffective assistance of counsel, we grant the application, stay the execution and remand the case to the district court with instructions to the trial judge to conduct an evidentiary hearing on whether defendant received effective assistance of counsel and to reconsider defendant's entire application in light of that evidence.

STATE OF LOUISIANA	*	24TH JUDICIAL DISTRICT COURT
VERSUS	*	STATE OF LOUISIANA
ROBERT SAWYER	*	PARISH OF JEFFERSON
	*	NO. 79-2841, DIVISION "G"

JUDGMENT

Petitioner's post-conviction Application for Habeas Corpus came for hearing on the 25th day of July, 1984, and by agreement of counsel, was submitted on the record, affidavits, stipulation and memoranda of law.

PRESENT: Elizabeth W. Cole and
Catherine Hancock
Attorneys for petitioner,
Robert W. Sawyer;

William C. Credo, III,
Assistant District Attorney
for Respondents, Ross Maggio,
et als.

IT IS ORDERED, ADJUDGED AND DECREED, that Petitioner's Writ of Habeas Corpus be, and is hereby DENIED.

JUDGMENT READ, RENDERED AND SIGNED in Open Court this 8th day of February, 1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

(Caption omitted in printing)

REASONS FOR JUDGMENT

This matter came for hearing pursuant to a remand from the Louisiana Supreme Court to determine the effect of a violation of C.Cr.P. Art. 512, the claims of ineffective assistance of counsel, and the defendant's (petitioner's) entire application for Writ of Habeas Corpus. Of the twenty (20) claims asserted by petitioner, the Court finds that several of these claims are overlapping, and therefore, will address them by substantive issue presented therein.

Claim 1

DENIAL OF DUE PROCESS AND EQUAL PROTECTION CONSTITUTIONAL RIGHTS BY APPOINTED COUNSEL WHO HAD BEEN ADMITTED TO THE BAR FOR LESS THAN FIVE (5) YEARS (*C.Cr.P. Article 512*)

The record reflects that Robert W. Sawyer, petitioner herein, was indicted for First-Degree Murder on December 7, 1979, and was arraigned on January 24, 1980. At the arraignment, the Honorable Charles Gaudin appointed Wiley Beevers to represent Sawyer, who entered a plea of not guilty. Mr. Beevers had, at the time of the arraignment, more than five (5) years experience at the bar. James Weidner was also appointed by the Court to assist Mr. Beevers. It has been stipulated that Mr. Weidner did not have five (5) years experience at the bar at the time of his appointment. Mr. Beevers later withdrew, and Mr. Weidner was reappointed on March 27, 1980, as sole counsel of record. Prior to trial, Mr. Weidner engaged the

services of Sam Stephens, an attorney who was two (2) weeks short of the five (5) years requirement contained in C.Cr.P. Art. 512, which states:

> *When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleas to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned an assistant counsel.*

Sawyer was convicted of First-Degree Murder by a jury of twelve (12) on September 19, 1980. On that same day, the jury recommended the death penalty. For a recitation of the facts, see *State v. Sawyer*, 422 So.2d 95 (La.1982).

The issue before this Court is whether or not Sawyer's conviction should be reversed based on the technical violation of C.Cr.P. Art. 512. Irrespective of petitioner's contention that the mere violation of this article constitutes a denial of due process and equal protection of the laws, and therefore, should require a reversal, this Court is of the opinion that the legislative intent of Article 512 was to insure *effective assistance* of counsel to a defendant charged with a capital offense. Article 512 was designed, in this Court's opinion, as a safeguard against inexperienced counsel representing a defendant charged with such a serious offense. A violation of Article 512 could be viewed as a rebuttable presumption that the indigent defendant was not provided with effective assistance of counsel. However, this presumption could be

rebutted upon a showing that appointed counsel rendered effective assistance. The purpose of Article 512 would, therefore, be met when such a defendant, *in fact*, is represented by experienced counsel even though that attorney has slightly less than the requisite five (5) years admission to the bar. In this Court's opinion, the legislature suggested that competence occurs with five (5) years admission. Where competence is shown to exist, suggestion must give way to reality. In the instant case, the technical mandate of Article 512 was fulfilled when Wiley Beevers, an attorney who at the time of the time of arraignment had considerably more than five (5) years admission to the bar, was appointed as chief counsel to represent Sawyer. In accordance with said Article, James Weidner was appointed by the Court to assist Mr. Beevers. Thus, the genuine issue in this case is whether or not Mr. Weidner actually rendered effective assistance of counsel to Robert Sawyer. This issue will be more fully discussed under petitioner's Claim II. However, pretermitting this issue, respondents allege that the technical violation of Article 512 is, at most, harmless error. According to La. C.Cr.P. Article 912, *"a judgment or ruling shall not be reversed by an appellate court because of any error, defect, irregularity, or variance which does not affect substantial rights of the accused."* The burden of proving harmless error rests upon someone other than the person prejudiced by it to show that it was harmless. See *State v. Gibson*, 391 So.2d 421 (La.1980). Thus, respondents herein must prove that the trial court's failure to appoint counsel with five (5) years admission to the bar created little likelihood that such an error would have changed the results reached by the jury. See *State v. Ferdinand*, 441 So.

2d 1272 (La. App. 1 Cir., 1983), writ denied 445 So.2d 1233. Additionally, the United States Supreme Court held in *Chapman v. California*, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed. 2d 705 (1967) that some constitutional errors may be considered harmless if the beneficiary of the error *"prove(s) beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." Id.*, 386 U.S. 24, 87 S.Ct. 828. After reviewing seven (7) volumes of transcripts and the record, this Court is of the opinion that the error complained of did not constitute a substantial violation of petitioner's constitutional or statutory rights, and that respondents proved, beyond a reasonable doubt, that such an error was not a contributing factor to the verdict reached. As stated in *State v. McLeod*, 6 So.2d 145 (La.1942), *"While the accused is entitled to be protected against an invasion of rights guaranteed by the Constitution, these rights may not be employed on a pretext as a shield to thwart the process of justice." Id.* at 148. As previously stated, the better inquiry is whether or not the appointed attorney, James Weidner, in fact, rendered effective assistance of counsel, which is to be examined and discussed *infra*.

As regarding petitioner's argument that there was a denial or violation of his constitutional rights to due process and equal protection, the parties have stipulated that as of August 14, 1984, the 39 Louisiana inmates on death row (other than the petitioner) were provided with appointed counsel who had the requisite five (5) years admission to the bar. Petitioner contends that based on the language contained in *Bearden v. Georgia*, ___ U.S. ___, 103 S.Ct. 2064 (1983), citing *Williams v. Illinois*, 399 U.S. 235, 260, 90 S.Ct. 2018, 2031 (1970), certain factors must be

examined and weighed in order to determine if a violation of equal protection or due process exists:

(1) the nature of the individual interest affected;

(2) the extent to which it is affected;

(3) the rationality of the connection between legislative means and purpose; and

(4) the existence of alternative means for effectuating the purpose.

It should be noted that the petitioner is not attacking Article 512 as being unconstitutional; rather, he is asserting that the trial court did not apply Article 512 in such a manner as to provide petitioner with due process and equal protection of the laws, *i.e.*, by the trial court's failure to appoint counsel with the requisite five (5) years admission to the bar.

With regard to the first element, petitioner's interest consisted of having effective counsel defend his constitutional rights in accordance with the standard espoused by the United States Supreme Court in *Strickland v. Washington*, ___ U.S. ___ 104 S.Ct. 2052 (1984), to be discussed in Claim II. The extent to which petitioner's interest was affected was, in this Court's opinion, not grave or serious enough to warrant a reversal of his conviction for the main reason that, notwithstanding his lack of five (5) years admission to the bar, Mr. Weidner rendered effective assistance of counsel. The reasons for this decision will be provided *infra*. With respect to the rational relation between the State's interest in prosecuting the petitioner in an efficacious manner and the means employed to effectuate their purpose, this Court finds that the trial

court's failure to satisfy the mandate of Article 512 does not outweigh the State's interest in protecting society and seeking justice. Lastly, this Court acknowledges that alternative means were available to the trial court, namely, appointing counsel who had been admitted to the bar for five (5) or more years.

In weighing the aforementioned factors in compliance with *Bearden, supra,* this Court is of the opinion that whatever harm, if any, that occurred to petitioner as a result of the trial court's failure to adhere to Article 512, in its entirety, the State's interest in trying the petitioner on behalf of the residents of Louisiana clearly preponderates in favor of not finding a violation of petitioner's due process or equal protection rights.

Claim II

INEFFECTIVE ASSISTANCE OF COUNSEL

By agreement between the State and the petitioner, this issue was submitted on the record, affidavits, stipulations Habeas Corpus petition and its accompanying affidavits.

The leading case for a claim for ineffective assistance of counsel in *Strickland v. Washington,* ___ U.S. ___, 104 S.Ct. 2052 (1984). As succinctly stated by the United States Supreme Court:

> *(a) convicted defendant's claim that counsel's assistance was so defective as to require reversal of a conviction or death sentence has two components. First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not*

> *functioning as the "counsel" guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defendant. This requires showing that counsel's errors were so serious as to deprive defendant of a fair trial, a trial whose result is reliable. Unless a defendant makes both showings, it cannot be said that the conviction or death sentence resulted from a breakdown in the adversary process that renders the result unrealiable (sic).*

Id., at ___, 104 S.Ct. at 2054. The Court further indicated that where the defendant fails to demonstrate prejudice, the alleged deficiencies in counsel's performance need not even be considered. According to *Strickland, supra, "if it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." id.*, at ___, 104 S.Ct. at 2070. The standard for attorney performance remains simply "reasonableness" under prevailing professional norms. Thus, based on the holding in *Strickland, supra,* a convicted defendant complaining of ineffective assistance of counsel has the burden of showing that *"counsel's representation fell below an objective standard of reasonableness." Id.*, at 104 S.Ct. at 2065.

Petitioner sets forth several grounds to support his claim that his trial counsel rendered ineffective assistance which can be grouped together:

(1) *Failure to Interview Various Potential Witnesses*

It was held in *Murray v. Maggio,* 736 F.2d 279 (5 Cir. 1984), that *"complaints of uncalled witnesses are not favored in federal habeas review. . . . and the (defendant) must*

overcome a strong presumption that (counsel's) decision in not calling . . . a witness was a strategic one." Id., at 282. This Court is of the opinion that given the strength of the State's case, it was probably strategic on the part of counsel not to call other witnesses who might have made inconsistent statements which would have damaged the defendant's case. Furthermore, under the standard in *Strickland, supra*, hindsight is not considered in testing the reasonableness of counsel's performance. Therefore, petitioner has not demonstrated deficient performance which prejudiced his defense.

(2) *Failure of Counsel to Allow the Venire to be Informed of the Penalties for the Lesser Included Offenses of Second Degree Murder and Manslaughter.*

As stated previously, much deference is given to the strategy of counsel in preparing his defense. This Court can only speculate as to the reasons Mr. Weidner objected to the prosecutor's attempt to inform the venire of penalties for lesser included offenses. Nevertheless, petitioner has failed to show deficient performance on the part of counsel.

(3) *Ineffective Representation at the Voir Dire Stage.*

In reviewing the transcript of the voir dire examination, it is the opinion of this Court that an attorney's intuition must be given respect when he examines potential jurors. It is common knowledge among the legal profession that "intuitive" feelings of the attorney play a large role as to whom he selects as a juror. This Court must label jury selection as "strategy" on the part of

counsel, and hold that petitioner has not proven that Mr. Weidner's conduct was not one of strategy.

(4) *Waiver of Closing Argument During Guilt/ Innocence Phase.*

It is the opinion of this Court that Mr. Weidner's choice in not giving closing arguments falls within the zone of strategy. *William v. Beto*, 354 F.2d 698, 703 (5 Cir. 1965).

(5) *Failure to Investigate Character and Expert Witnesses as it Related to the Defense of Intoxication and Penalty Phase.*

Petitioner alleges that Mr. Weidner chose only to call three (3) character witnesses at the penalty phase, and therefore, prejudiced his chances of mitigation. This Court opines that Mr. Weidner's strategy in not calling more witnesses to attest to the character of the petitioner was probably to the latter inasmuch as repetition tends to sound insincere. As stated by the Fifth Circuit in *Larsen v. Maggio*, 736 F.2d 215 (5 Cir. 1984):

> *(r)epresentation is an art, and an act or omission that is unprofessional in one case may be sound or even brilliant in another.*

Id., at 217. Thus, petitioner has failed to show that he was prejudiced. Petitioner further contends that the two psychiatrists called with regard to the intoxication defense were not offered by Mr. Weidner as experts in the field of alcoholism. A review of the transcripts show that both doctors were given hypothetical questions to a situation where an individual consumes a considerable amount of alcohol, and then commits the acts of which petitioner was accused. The opinion of one psychiatrist was that the person was suffering from a toxic psychosis secondary to

alcohol. The other psychiatrist testified on direct that the petitioner probably had a sociopathic personality. It is the opinion of this Court that Mr. Weidner's examination was both effective and meaningful considering the strength of the State's case, and that any errors he may have committed with regard to his examination was not sufficient to prejudice the petitioner's defense.

(6) Failure of Counsel to Inform Defendant of his Right to Testify.

Petitioner's Claim III, concerning his denial of the right to decide whether or not to testify, will be addressed here insofar as it bears on the issue in ineffective assistance of counsel. After reviewing the record, affidavits and stipulations, this Court finds no evidence whatsoever to support petitioner's allegation that he was not informed by counsel of his right to testify. Therefore, this claim is without merit.

(7) Failure of Counsel to Object to Remarks Made by the Prosecutor not in Evidence.

Even should this omission by counsel be considered as unreasonable or below the standard enunicated in *Strickland, supra,* petitioner has failed to prove prejudice sufficient to undermine the confidence in the outcome.

In light of the *Strickland, supra,* holding, petitioner did not meet his burden of proving that counsel's performance was deficient, and that such performance prejudiced the petitioner so seriously that he was deprived of a fair trial. In summary, petitioner has failed to show a reasonable probability that, but for the alleged errors committed by his trial counsel, the jury would have had a reasonable doubt respecting his guilt. *Murray v. Maggio,*

736 F.2d 279 (5 Cir. 1984). This Court notes that not only was Mr. Weidner's representation "reasonable" given the totality of the circumstances, he demonstrated a remarkable ability to defend his client in light of the enormous amount of evidence in the hands of the prosecution. Truly, he demonstrated wisdom beyond his years.

Claim III

FAILURE OF COUNSEL TO INFORM PETITIONER OF HIS RIGHT TO TESTIFY

This issue was addressed under Claim II(6), *supra.*

Claims IV - XX

In his petition for habeas corpus, petitioner also claims that his conviction, or in the alternative, his death sentence, sould (sic) be vacated because of a host of other errors. This Court has exhaustively studied the record, the transcripts, affidavits and stipulations in connection with petitioner's claims, and believes that those other claims are so seriously lacking in merit that no reasonable jurist could come to a conclusion that is different from the conclusion reached by the Louisiana Supreme Court. *Barefoot v. Estelle,* ___ U.S. ___, 103 S.Ct. 3383, *reh. den.* 104 S.Ct. 209 (1983). As to these other claims, petitioner has not made a substantial showing of the denial of a constitutional right, recognized by either the State or Federal Constitution. Accordingly, all of petitioner's remaining claims are rejected by this Court.

For the reasons stated hereinabove, petitioner's claims for post-conviction habeas corpus relief are denied.

GRETNA, LOUISIANA, THIS 8th DAY OF February, 1985.

/s/ M. Joseph Tiemann
M. JOSEPH TIEMANN,
JUDGE, DIV. "G"

Supreme Court of Louisiana.

STATE of Louisiana ex rel.
Robert SAWYER

v.

Ross MAGGIO, Jr., Warden, Louisiana
State Penitentiary.

No. 85-KP-0660.

May 13, 1985.

PER CURIAM.

In our previous order we instructed the district court to conduct an evidentiary hearing on whether defendant received effective assistance of counsel and to reconsider defendant's entire application in light of that evidence. 450 So.2d 355 (La.1984). The parties and the district court misconstrued our order of an evidentiary hearing as being limited to the issue of whether counsel was ineffect because he had not been admitted to the bar for at least five years. Our concerns were not so limited, however, and we now remand the case for an evidentiary hearing on all of the defendant's allegations of ineffective assistance of counsel during the preparation, trial and penalty phase of his case.

WRIT GRANTED; CASE REMANDED FOR EVIDENTIARY HEARING.

LEMMON, J., concurs. This Court's determination of relator's claim may turn on evidence regarding defense counsel's waiver of closing argument during the guilt phase.

24TH JUDICIAL DISTRICT,
PARISH OF JEFFERSON
STATE OF LOUISIANA

Louisiana v. Robert Sawyer

Docket No. 79-2841

* * *

[186] THE COURT: No, I'm really trying –

MR. CREDO: And I believe that the proper compromise to the State's position and petitioner's position is that the Court can render a written judgment today, if it desires, saying that the petition is denied, and the stay is maintained until such time as the transcript of these proceedings is filed, which will give the petitioner approximately –

THE COURT: What I don't want to do is have to go through and cause again the Supreme Court to go that extra, they are burdened enough. I really think I'm going to let the ruling stay, and let's do that. Follow your suggestion. We'll not tamper with the stay order. We will deny the petition. That way, if they say well, I went beyond what they intended, so be it, certainly all right. But if I did not rule, and they say, "well, we are waiting on a ruling from the trial court." Then there would be a further unduly delay. So, the ruling is that the petition is denied.

MR. CREDO: Does the Court wish to dictate its reasons for the denial into the record?

THE COURT: [187] What I would like to do is – again, the reasons are similar to what was reasoned earlier in the written reasons for the denial. I am as convinced as ever, in some areas even more convinced,

having heard the statements and testimony of witnesses that what we had in this case, which Mr. James Weidner of this Parish defended Mr. Robert Sawyer, that we had a mature and reasoned, and in some ways seasoned certainly beyond his physical years, for the defense of this gentleman.

Was the defense successful, of course, it was not. I mean that is obvious. We wouldn't be here today if it was successful. He would be free somewhere in Tennessee, or somewhere else.

Was it lacking? Someone once said, you know, "Even Homer nods", which means that he fell asleep one night and didn't complete a paragraph, or a sentence, or left a dangling participle. This is an imperfect world.

We had a man who is an acknowledged and accepted expert saying. "I would have done this differently, but there are exceptions in each rule."

I am as convinced as ever, as I say in some areas more convinced, maybe I did detect, shall I call it a weakness in the defense that I was not privy to, or aware of before, but on [188] balance, on balance I cannot imagine a better defense. Would it have been different? Of course, we all do things differently.

Mr. Weidner's testimony, for example, as to why he chose not to give that closing argument, it was reasoned and well reasoned out. The question here is was the defense adequate? He said he was very familiar with the trial tactics of Mr. Boudousque. It has been alleged that certain law enforcement officers have good guy and bad guy type things. One guy strenuously interrogates, and

when he leaves, the defendant, or the person being questioned, is breathless and afraid. Another officer comes in and says "Hi, how are you doing?" He says "How am I doing?" He says "That man just threatened to take my head off with his left foot." That is – "You got to be joking, that is a mean thing to do. Tell me all about it."

Apparently, this was thought to be the tactic of Mr. Boudousque. "Hi, ladies and gentlemen, we're here today. We have five elements. I think I have got them all. Well, that is about it. Thank you so much." And then when the defense lawyer gets up and says this, this, and this, then he says, "This is preposterous, I can't stand the quiet no longer", and just thunder away. I'm just conjecturing because I have never been in a case with Mr. [189] Boudousque.

But my point is that these things were not done in a cavalier fashion, not done without some reasoning. In fact, it was charming in a good sense of that term, that Mr. Weidner stated, and I'm sure just a small amount of blushing, that he practices his speech in front of his bath room mirror. He had apparently, and this Court feels, a feeling of, how shall I say it, it's a dedication I guess is the term I am searching for, to this cause. He was espousing at the time, namely, the proper and best defense he could to Mr. Sawyer.

It's interesting, and I note this again, I guess it's a question of style. Mr. Beevers was so convinced that the man had little or no chance to succeed at a trial on the matter, that he sought additional help from a man more wise in his experience, by his own admission, he said "Go

to the defendant and beg and plead with him", do this and this. And this is the best you can do.

Mr. Beevers apparently was so upset at this rejection that he chose to ask to have the Court allow him to withdraw from the case. I am sure that Mr. Weidner, had he been apprised of this, knowing of this, still having put his hands to the plow, kept along the furrow. He plowed as straight as he could.

[190] I think the question is did he turn his back and say "See you later." He hung with it to the end. Was he successful, no. Was he correct, who knows. Everybody has a different style, in my opinion. But these are my rambling reasons.

The man did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say "You have to have been in business at least five years."

When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality.

It's my opinion, as I say, enough was here shown to say there was effective counsel. There was – all the other things that were to be [191] addressed have been addressed. And those are my reasons for denying the petition.

Ms. COLE: Your Honor, we will notify the Court of our official intent to apply to the Supreme Court.

THE COURT: Thank you all.

(Discussion off the record.)

THE COURT: As the Court appreciates it, there's been an oral motion, rather an oral notice of appeal. The Court would like that to be filed by written notice, or motion, if you will, which, of course, is granted.

The Court feels that sixty days should be sufficient time. If it's not, certainly an extension would be entertained. And if that is the case, give sixty days for perfecting the appeal.

Ms. COLE: Sixty days from the physical filing of the notice, or sixty days from today?

THE COURT: Let's give –

MR. CREDO: The court reporter has sixty days from today to file the transcript.

(End of Proceedings.)

Supreme Court of Louisiana.

STATE ex rel. Robert SAWYER

v.

Ross MAGGIO, Jr. Warden, Louisiana State Penitentiary.

No. 85-KP-2056.

Dec. 13, 1985.

In re Sawyer, Robert; applying for supervisory writs and writ of habeas corpus; Parish of Jefferson, 24th Judicial District Court, Div. "G", No. 79-2841.

Denied,

DIXON, C.J., and CALOGERO and DENNIS, J.J., would grant the writ.

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

ROBERT SAWYER	CIVIL ACTION
versus	NUMBER 86-223
FRANK BLACKBURN, WARDEN	SECTION "I" (4)

FINDING AND RECOMMENDATION

DATE OF ENTRY SEP 9 1986

On January 21, 1986, this matter was referred to the United States Magistrate for the purpose of conducting a hearing, including an evidentiary hearing, if necessary, and submission of proposed findings and recommendations for disposition pursuant to 28 U.S.C. § 636(b)(1)(B) and (C) and, as applicable, Rule 8(b) of the Rules Governing Section 2254 Cases.

Robert Sawyer is a state prisoner incarcerated in the Louisiana State Penitentiary, Angola, Louisiana. He was convicted on September 19, 1980 of First Degree Murder after trial by jury in the Twenty-Fourth Judicial District Court for the Parish of Jefferson, State of Louisiana. The jury recommended that petitioner be sentenced to death.

Petitioner's conviction and sentence was affirmed on appeal. State v. Sawyer, 422 So.2d 95 (La. 1982). Upon application for certiorari to the United States Supreme Court, the case was remanded for consideration in light of the holding in Zant v. Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 335 (1983); See Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983). Upon remand, the Louisiana Supreme Court again affirmed the death sentence. Sawyer v. Louisiana, 442 So.2d 1136 (La.

1983). The United States Supreme Court denied a subsequent application for certiorari. 466 U.S. 931, 104 S.Ct. 1719, 80 L.Ed.2d 191 (1984).

Petitioner was represented at the trial court level by James S. Weidner, Jr., Esquire, and by Samuel Stephens, Esquire. He was represented on his direct appeal by David Katner, Esquire, and by George Escher, Esquire.

In his application for habeas corpus relief under 28 U.S.C. § 2254, petitioner alleges a violation of the Constitution and laws of the United States as follows:

1. "The death-qualification of petitioner's guilt-phase jury was illegal and unconstitutional."
2. "Petitioner was denied the right of effective assistance of counsel in violation of his rights of equal protection and due process under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."
3. "Petitoner received ineffective assistance of counsel from his court appointed attorney in violation of his rights under the Sixth, Eighth and Fourteenth Amendments of the Constitution of the United States."
4. "Prosecutorial misconduct during closing argument in the penalty phase of the trial rendered petitioner's trial fundamentally unfair in violation of his rights under the Fifth, Sixth, Eighth and Fourteenth Amendments of the Constitution and Article I, Section 2, 3 and 13 of the Louisiana Constitution of 1974."
5. "Petitoner was denied his right to a fair sentencing under the Eighth and Fourteenth Amendments of the United States,

Constitution and under the Louisiana Constitution, because the prosecutor injected an arbitrary factor into the jurors' deliberations by explicitly misleading them concerning their role as final judges in imposing the death sentence."

6. "Petitioner was denied his Fifth and Fourteenth Amendment rights guaranteed by the United States Constitution and his right under Art. 1, Section 16 of the Louisiana Constitution of 1974 to decide for himself whether or not he would testify at trial."

7. "The trial court did not instruct the jury during the guilt/innocence phase of petitioner's trial that the defendant is not required to testify and that no presumption of guilt may be raised, thereby violating petitioner's rights guaranteed by the Fifth, Sixth, Eighth and Fourteenth Amendments of the United States Constitution and the laws and Constitution of the State of Louisiana."

8. "The trial court's instruction to the jury at the guilt/innocence phase of his trial improperly relieved the State of its burden of proof beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."

9. "The trial court's instructions to the jury at the guilt/innocence phase of petitioner's trial improperly beyond a reasonable doubt that petitioner had the specific intent to kill or inflict great bodily harm, an essential

element of the crime of first degree murder, in violation of petitioner's rights under the laws and Constitution of the State of Louisiana and the Sixth, Eighth and Fourteenth Amendments of the United States Constitution."

10. "The trial court excused jurors, who expressed only general opposition to the death penalty, depriving petitioner of the right of a jury composed of a representative cross section of the community as guaranteed by the Sixth, Eighth and Fourteenth Amendments to the United States Constitution and the laws and Constitution of the State of Louisiana and the standards set in Witherspoon v. Illinois, 391 U.S. 510 (1968)."

11. "The imposition of a death sentence where one of the aggravating circumstances is not supported by the evidence violates the Eighth and Fourteenth Amendments."

12. "Petitioner's Fifth, Sixth, Eighth and Fourteenth Amendment rights were violated by the introduction of inadmissible evidence that defense counsel had no effective opportunity to rebut during the capital sentencing hearing said evidence injected on arbitrary factor into the sentencing hearing."

13. "Petitioner's sentence is excessive and disproportionate."

14. "Petitioner's sentence is arbitrary and capricious."

15. "Electrocution is a cruel and unusual means of punishment."

16. "Petitioner's sentence is invidiously discriminatory."

17. "Capital punishment is an excessive penalty."

18. "The cumulative effect of violations of petitioner's rights is in itself a violation of petitioner's constitutional rights."

These grounds[1] were presented in an application for post-conviction relief to the state trial court. An evidentiary hearing was conducted by the trial court before denying petitioner's application.

Petitioner applied for writs of certiorari and review with the Louisiana Supreme Court of the trial court's denial of his application. The Louisiana Supreme Court denied petitioner's application without comment. Sawyer v. Maggio, 479 So.2d 360 (La. 1985). Application for reconsideration was denied. 480 So.2d 313 (La. 1985).

The duplicate record of the Louisiana Supreme Court is before this Court. This record is sufficient for the purpose of adjudication of petitioner's claim and a federal evidentiary hearing is not necessary. 28 U.S.C. § 2254(b); Townsend v. Sain, 372 U.S. 293, 83 S.Ct. 745, 9 L.Ed.2d 770 (1963).

We adopt the following statement of facts which are set forth in the opinion of the Supreme Court of Louisiana, recounting the events which led to petitioner being charged with murder.

> "A series of bizarre and frightful events, which led to the death of Fran Arwood, occurred at the

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[1] Grounds 4, 11 and 12 additionally were presented to the Louisiana Supreme Court in petitioner's appeal of his conviction.

residence where defendant was living with Cynthia Shano and Ms. Shano's two young sons. Ms. Arwood was divorced from Ms. Shano's stepbrother, but remained friendly with her and often helped her by taking care of the children. Defendant had lived with Ms. Shano in Texas for several months and had professed an intention to marry her.

On September 28, 1979, Ms. Arwood was staying with Ms. Shano and helping with the children while Ms. Shano's mother was in the hospital. Defendant and Ms. Shano went out for the evening. Defendant returned at about 7:00 o'clock the next morning with Charles Lane, whom defendant had apparently met in a barroom and had invited to the residence for more drinking and talking.

Defendant and Lane continued their drinking while listening to records. At some time during the morning, Ms. Shano left to check on her hospitalized mother. When she returned, she noticed that Ms. Arwood was bleeding from her mouth. Defendant told Ms. Shano that he had struck Ms. Arwood after an argument in which he accused Ms. Arwood of giving some pills to one of the children.

The reasons behind the events that followed are difficult to discern accurately from the record and more difficult to comprehend. However, defendant does not vigorously contest the fact that Ms. Arwood in his presence was beaten, scalded with boiling water and burned with lighter fluid, or that the ferocity of the attack and the severity of the injuries caused her to die several weeks later without ever regaining consciousness.

After the original altercation during Ms. Shano's absense, defendant and Lane, for some unexplained reason, decided that Ms. Arwood

needed a bath. When she resisted, defendant struck her in the face with his fist, and both men pummeled her with repeated blows. Ms. Shano objected, but defendant locked the front door and retained the key, threatening to harm Ms. Shano if she interfered or even revealed the incident.

Acting in concert, defendant and Lane dragged Ms. Arwood by the hair to the bathroom, stripped her naked, and literally kicked her into the bathtub, where she was subjected to dunking, scalding with hot water, and additional beatings with their fists. A final effort by Ms. Arwood to resist the sadistic actions of her tormentors resulted in defendant's kicking her in the chest, causing her head to strike either the tub or an adjacent windowsill with such force as to render her unconscious. Although she did not regain consciousness, defendant and Lane continued to use her body as the object of their brutality.

Defendant and Lane dragged her from the bathroom into the living room, where they dropped her, face down, onto the floor. Defendant then beat her with a belt as she lay on the floor, while Lane kicked her. They then placed her on her back on a sofa bed in the living room. As Ms. Shano went to the bathroom, she overheard defendant say to Lane that he (defendant) would show Lane 'just how cruel he (defendant) could be'. When she reentered the living room, she was struck by the pungent smell of burning flesh. She then discovered that defendant had poured lighter fluid on Ms. Arwood's body (particularly on her torso and genital area) and had set the lighter fluid afire.

Then, displaying a callous disregard for the helpless (and mortally injured) victim, defendant and Lane continued to lounge about the residence listening to records and discussing the

disposition of Ms. Arwood's body. Lane fell asleep next to the beaten and swollen body of the victim.

Shortly after noon, Ms. Shano's sister and nephew came to visit. When the nephew knocked insistently, defendant gave Ms. Shano the key to open the door, and she ran screaming to the safety of her relatives. Her excited ravings ('They've killed Fran and they're trying to kill me') were incomprehensible to her nephew and sister until they looked inside and saw the gruesome scene and Ms. Arwood's beaten and blistered body. They also saw defendant sitting with his feet propped up on the edge of the couch.

In the meantime, Ms. Shano called for police and emergency units. When the authorities arrived, they took Lane and defendant to jail, and rushed Ms. Arwood to a hospital, where she subsequently died." [Footnotes omitted]. State v. Sawyer, 422 So.2d 95, 97-98 (La. 1982).

1. The Death Qualification of Petitioner's Guilt-Phase Jury Was Illegal and Unconstitutional

Petitioner claims that he was denied his right to a fair trial under the Sixth, Eighth and Fourteenth Amendments because a qualified group of venire persons were excluded from both the penalty phase and the guilt phase of his trial on the grounds that they were opposed to the death penalty.

This issue is without merit, having been foreclosed by the Supreme Court's recent decision in Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 1758, 90 L.Ed.2d 137 (1986); See Brogdon v. Blackburn, 790 F.2d 1164 (5th Cir. 1986).

2. Ineffective Assistance of Counsel

Petitioner raises claims of ineffective assistance of counsel in grounds two and three of his application. Since the claims in both grounds are related, we will treat both claims together.

Petitioner first contends that he was denied the effective assistance of counsel by the failure of the state trial court to appoint an attorney with at least five years of experience to represent him.

Petitioner, an indigent, was entitled to court-appointed counsel. He was originally represented by Wiley Beevers who had been admitted to practice in Louisiana for over five years. Mr. Beevers, after reaching irreconcilable differences,[2] with petitioner was allowed to withdraw as counsel. The state trial court appointed James Weidner, Jr. to represent petitioner. Mr. Weidner advised the court that he had not been admitted to practice for five years but was told to associate counsel with the required number of years of experience.

Mr. Weidner, at the time of petitioner's trial, had been admitted to the practice of law approximately four years. Mr. Weidner attempted, but was unsuccessful in

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[2] Mr. Beevers testified during the state's evidentiary hearing that the irreconcilable differences consisted of petitioner refusing to follow his advice to enter a plea of guilty to second degree murder or first degree murder without capital punishment. (R., Evidentiary Hearing, July 12, 1985, p. 16). Had petitioner accepted the offer of a plea agreement, he could only have received a sentence of life imprisonment. LSA R.S. 14:30.1.

securing an attorney to assist him at trial. (R., Tr., Evidentiary Hearing, July 12, 1985, p. 120). He was successful, however, in engaging Samuel B. Stephens to assist him with petitioner's case.[3] At the time of trial, Mr. Stephens was just a few weeks shy of having been admitted to practice five years. (R., Petitioner's State Exhibit Z).

Louisiana law provides:

> "When a defendant charged with a capital offense appears for arraignment without counsel, the court shall provide counsel for his defense in accordance with the provisions of R.S. 15:145. Such counsel must be assigned before the defendant pleads to the indictment, but may be assigned earlier. Counsel assigned in a capital case must have been admitted to the bar for at least five years. An attorney with less experience may be assigned as assistant counsel." Louisiana Code of Criminal Procedure (La. C.Cr.P. Art. 512).

Although it may be necessary to consider the performance by Messrs. Weidner and Stephens in connection with the above claim, the issue raised by petitioner is not an ineffective assistance of counsel claim, but essentially a denial of equal protection.

The state trial judge, after an evidentiary hearing, concluded that noncompliance with the directive of Article 512 is not fatal to a capital conviction when a defendant actually receives effective assistance of counsel.

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[3] Mr. Weidner also secured the services of John Tooley, an attorney with over twenty-eight years experience, to assist him in pre-trial hearings.

The trial judge for reasons orally assigned held:

> "The man [Weidner] did not only the best he could, but on reflection he did very good. I said in earlier reasons if the Court would like me to comment, the Supreme Court, on the five year rule, I served in the legislature for ten years. I know a little something about the legislative intent of these matters. And it's my opinion, I didn't draft, or was part of this particular five year rule, but it's my opinion that it's there as a floor. In other words, we have to have some criteria, a minimum shall be to insure that people out there are able to defend, or function in this particular case properly; that we say 'You have to have been in business at least five years.'
>
> When we find that in truth and in fact someone meets specific criteria of ability and knowledge and dedication and understanding, then this artificial, if you will, floor, or criteria must give way to reality." (R., Tr., Evidentiary Hearing, July 12, 1985, p. 190).

Prior to the Louisiana Supreme Court's remand with directions to conduct an evidentiary hearing, the state trial court issued written reasons substantially identical to those above in its inital (sic) denial of petitioner's application. (R., Reasons for Judgment, February 8, 1985, pp. 2-3).

At the conclusion of the evidentiary hearing conducted on July 12, 1985, the state trial judge denied petitioner's application for post-conviction relief on the above, as well as other grounds raised.

The Louisiana Supreme Court denied, without comment, petitioner's application for certiorari and review of the trial court's ruling.

The requirement that an attorney possess a minimum of five years experience before he can be appointed to represent a defendant charged with a capital crime is a requirement of state law.

While we are bound by determinations of state law by courts of that state, Avery v. Alabama, 308 U.S. 444, 60 S.Ct. 321, 84 L.Ed. 377 (1940); Garner v. Louisiana, 368 U.S. 157, 82 S.Ct. 248, 7 L.Ed.2d 207 (1961); Willeford v. Estelle, 538 F.2d 1194 (5th Cir. 1976); Hall v. Wainwright, 493 F.2d 37 (5th Cir. 1974), we are unable to locate any other case in which the highest court of Louisiana has given the same interpretation to Article 512 as did the state trial court herein.[4]

The state trial court in its written reasons of February 8, 1985 concluded that petitioner's due process and equal protection rights were not violated by the failure of the court to appoint him an attorney with five or more years experience. (R., Reasons for Judgment, supra, p. 5). We do not have to reach the issue of whether petitioner's due process or equal protection rights were violated since any alleged breach of those rights was harmless beyond a

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[4] The refusal of the Louisiana Supreme Court to grant writs in the case *sub judice* does not constitute a ruling on the merits. See State v. Guillot, 353 So.2d 1005, 1007 n.1 (La. 1977); Coco v. Winston Industries, Inc., 341 So.2d 32, 335 n.1 (La. 1977). The Louisiana Supreme court appeared to take the same approach taken by the state trial court herein in determining whether the dictates of Article 512 were violated in State v. Motton, 395 So.2d 1337, 1342 (La. 1981), cert. denied, 454 U.S. 850, 102 S.Ct. 289, 70 L.Ed.2d 139 (1981), when it held, on a record silent as to the length of time of practice of an appointed attorney, that the defendant failed to establish prejudice.

reasonable doubt and, consequently, does not raise a federal constitutional question. Chapman v. California, 386 U.S. 18, 87 S.Ct. 824, 17 L.Ed.2d 705 (1967).

The state trial court concluded in its assigned oral reasons that petitioner received effective assistance of counsel. The trial judge found, "[in Mr. Weidner] . . . we had a mature and reasoned and in some ways seasoned certainly beyond his physical, years, for the defense of this gentleman."[5] (R., Evidentiary Hearing, July 12, 1985, p. 187).

A review of the state record convinces us that petitioner received the effective assistance of counsel in Mr. Weidner's representation.

The only prejudice that petitioner seeks to establish in not having been represented by counsel with at least five years experience is the alleged deficient conduct set forth in his claim of ineffective assistance of counsel. We find that claim to be meritless for reasons assigned below.

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[5] In the earlier stages of the criminal proceeding, petitioner was represented by Mr. Beevers, who met the time qualifications of Article 512. After Mr. Beevers withdrew as petitioner's attorney, Mr. Weidner along with Mr. John Tooley represented petitioner at hearings on pre-trial motions. At trial, Mr. Weidner had the assistance of Sam Stephens. Mr. Tooley had been a member of the bar for over twenty years. Mr. Stephens had been a member for four years, eleven months and a few weeks. Although Messrs. Tooley and Stephens were not appointed by the court to represent petitioner, a distinction perhaps with little difference, it would appear that petitioner was at all times represented by counsel within the spirit, if not the letter of Article 512.

The state court record and the trial transcript reveal that the evidence of petitioner's guilt was ample. Petitioner's exculpatory statement introduced into evidence at trial by the state alleged that Lane was responsible for the acts causing the victim's death. However, defendant did not seriously contest at trial his involvement in the beating and burning of the victim. The theory of his defense was that he lacked the specific intent to commit first degree murder due to intoxication. Ms. Shano testified that she saw petitioner kick Ms. Arwood into the bathtub rendering her unconscious. (R., Tr., pp. 1146-49). She also saw petitioner pour hot water on Ms. Arwood, walk all over her back as she was lying on the floor and beat her with a belt. (R., Tr., pp. 1149-50). Ms. Shano also testified that she overheard petitioner say, "[I] can show you how cruel I can be . . . " just before she smelled something burning. (R., Tr., p. 1151). Ms. Shano also overheard conversations between Lane and petitioner which indicated petitioner set fire to Ms. Arwood. (R., Tr., p. 1152).

The fingerprints found on the can of lighter fluid used to set Ms. Arwood on fire belonged to petitioner. The Louisiana Supreme Court found the evidence "ample" from which a rational juror could have found that the defendant was engaged in the perpetration of aggravated arson and that he had acted with specific intent. State v. Sawyer, supra, 422 So.2d at 99. The court's determination is entitled to great weight. Wingo v. Blackburn, 786 F.2d 654 (5th Cir. 1986). Webster's New Collegiate Dictionary defines ample as "generous or more than adequate in size, scope, or capacity . . . generously sufficient to satisfy a requirement or need".

Petitioner does not address the deficiency of appellate counsel, both of whom he claims had not been admitted to practice for more than five years at the time of their representation of him.

The record reflects that these attorneys presented both meaningful and serious issues to the Louisiana Supreme Court in petitioner's appeal.

Petitioner does not suggest other issues appellate counsel might have urged on appeal. Petitioner must establish " . . . [t]hat counsel's errors were so serious that counsel was not functioning as the counsel guaranteed to the defendant by the sixth amendment." McCrae v. Blackburn, 793 F.2d 684 (5th Cir. 1986). Any error in the appointment of appellate counsel with more than five years experience to represent petitioner is likewise harmless beyond a reasonable doubt.

Petitioner's claim that he was denied equal protection of the law in the appointment of counsel with less than five years experience is without merit.

Petitioner raises several instances of alleged deficient conduct on the part of his counsel in his claim that he did not receive the effective assistance of counsel.

He claims that counsel: -

a) was admitted to practice for less than five years;

b) objected to the prosecutor advising the jury panel during voir dire of the penalties for lesser included offenses;

c) failed to object during voir dire to the prosecutor's reference to evidentiary facts that were not later established at trial;

d) failed to conduct a meaningful voir dire;

e) failed to discuss with petitioner the nature of the defense;

f) failed to allow petitioner to testify during the guilt phase of the trial;

g) failed to adequately prepare defense witnesses for trial;

h) failed to call an expert that would have been able to give an opinion as to the effect of alcohol on petitioner;

i) failed to present a closing argument during the guilt phase of the trial;

j) presented an unprepared defense during the penalty phase of trial;

k) failed to object or move for mistrial during improper argument by prosecution during penalty phase of trial;

l) failed to object to erroneous instructions given the jury by the court during guilt and penalty phase of trial; and

m) failed to make effective closing argument during penalty phase of trial.

In order to prevail on a claim of ineffective assistance of counsel, petitioner must show: 1) that his counsel's performance was deficient; and, 2) that the deficient performance prejudiced the defense. Strickland v. Washington, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984); Murray v. Maggio, 736 F.2d 279 (5th Cir. 1984).

Under the Supreme Court's formulation of the required showing of prejudice,

> "[T]he defendant must show that there is a reasonable probability that but for counsel's unprofessional errors, the result of the proceeding

> would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." Strickland v. Washington, supra, 104 S.Ct. at 2068.

If the Court finds that petitioner has made an insufficient showing as to either one of the two stages of inquiry, i.e. deficient performance or actual prejudice, the Court may dispose of the claim without addressing the other stage. Strickland v. Washington, supra, 104 S.Ct. at 2069-70.

In determining whether counsel's performance falls below the objective standard of reasonableness, our scrutiny should be "highly deferential", recognizing " . . . strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance". Strickland v. Washington, supra, 104 S.Ct. at 2066; Marler v. Blackburn, 777 F.2d 1007 (5th Cir. 1985).

Petitioner may not simply allege prejudice, he must affirmatively prove it. Strickland v. Washington, supra, 104 S.Ct. at 2067; Celestine v. Blackburn, 750 F.2d 353 (5th Cir. 1984), cert denied, ___ U.S. ___, 105 S.Ct. 3490, ___ L.Ed.2d ___ (1985); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983).

We now treat petitioner's individual claims of ineffective assistance of counsel.

a) Counsel's Admission To Practice For Less Than Five Years

Mere inexperience alone will not determine whether a defendant received effective assistance of counsel. The test rather is counsel's performance in representing the

defendant. United States ex. rel. Williams v. Twomey, 510 F.2d 634 (7th Cir. 1975), cert. denied, 423 U.S. 876, 96 S.Ct. 148, 46 L.Ed.2d 109; United States v. Badolato, 701 F.2d 915 (11th Cir. 1983).

Petitioner has not established that trial and appellate counsel's failure to meet the five year admission to practice minimum resulted in any prejudice to him. Counsel were effective. Petitioner does not show that the results of the trial or appeal would have been any different had counsel with more experience been appointed.

b) Counsel Objected To The Prosecutor Advising The Jury Panel During Voir Dire Of The Penalties For A Lesser Included Offense

Petitioner suggests that the jury should have been made aware that he could have been sentenced: 1) to life imprisonment, without benefit of parole, probation or suspension of sentence if it returned a guilty verdict of second degree murder; or, 2) twenty years imprisonment on a verdict of manslaughter. Petitioner does not explain, however, how this prejudiced him since it was possible for the jury to recommend a sentence of life imprisonment on his conviction of first degree murder. Petitioner's contention that the jury might have returned a verdict of manslaughter, had it known he could have received twenty years imprisonment, has even less support in light of the evidence.

We are convinced, in view of the evidence, that the verdict would not have been different had the jury been made aware of the alternate penalties.

c) Counsel Failed To Object During Voir Dire To The Prosecutor's Reference To Facts Not Later Established At Trial

Petitioner singles out two references made by the prosecutor during voir dire examination to support his claim. The references are to claims by the prosecutor that " . . . " [S]he [the victim] had a hammer shoved up her vaginal area as well as other incidents"; and "she was halfway drowned in the bathtub and set on fire after she was raped". (R., Petition, pp. 12-13).

The second referenced statement above was not a mischaracterization of the evidence ultimately produced during the trial. There is support in the evidence offered at trial that the victim was "halfway" drowned in the bathtub and set on fire after she was raped.

There was no evidence introduced during trial, however, which would support the first referenced statement that a hammer was used in the attack upon the victim.

Had counsel objected to the remark during voir dire, the jury's verdict would not have been different. The reference by the prosecutor to the use of the hammer, viewed in perspective to the actual torture and brutality inflicted upon the victim, could have have had only an inconsequential effect on the jury's verdict.

Defense counsel did request a mistrial during the testimony of a state witness who alluded to the possible use of a hammer during the attack on the victim. The court denied the motion and instructed the jury that up to that point in the trial, there had been no testimony about a hammer and to disregard the witness's comment. (R. Tr., pp. 1282-1285).

Petitioner suffered no prejudice by the prosecutor's earlier remark.

d) Counsel Failed To Conduct A Meaningful Voir Dire

Petitioner complains that counsel failed to inquire during voir dire examination of the prospective jurors' prior jury service and their attitude regarding the failure of a defendant to testify in his own behalf.

Petitioner does not articulate how he was prejudiced by counsel's failure to find out if the juror had prior jury service. It would be pure speculation to consider that one or more of the selected jurors would have been excused if it was known that he or she had served on a prior jury.

Additionally, petitioner has not established if there was in fact any jurors who had prior jury service.

Likewise, counsel's failure to inquire of the jurors' attitude regarding a defendant's failure to take the stand does not entitle petitioner to relief herein.

Counsel did not plan to call petitioner to the stand during the guilt phase of the trial. He testified during the state evidentiary hearing that he did not ask the prospective jurors about their attitude toward a defendant not taking the stand on his behalf, to avoid emphasizing the fact that petitioner would not in fact testify. It was a tactical decision. (R., Evidentiary Hearing, July 12, 1985, pp. 146-47).

e) Counsel Failed To Discuss The Nature Of His Defense With Petitioner

Petitioner claims that counsel did not consult with him about his defense and refers to an affidavit filed in the state record as Exhibit "AA" in support of his claim.

The allegations in petitioner's affidavit belie any contention that he was not apprised of the defense that was going to be presented on his behalf. He admitted discussing the case with counsel on several occasions, and on one occasion was told that "alcohol psychosis" would be advanced as a defense to the crime.

Petitioner's claim that he was not advised of his defense before trial is contradicted by his own affidavit, as well as Mr. Weidner's testimony during the state evidentiary hearing.

f) Counsel Failed To Advise Petitioner Of His Right To Testify On His Own Behalf

Petitioner, in connection with this claim, complains that he was not given the opportunity by his attorney on his own decision as to whether he would testify on his own behalf. Petitioner claims that he would have testified given the choice.

Petitioner, however, does not indicate what his testimony would have consisted of, had he been allowed to testify. He testified during the penalty phase of the trial that he remembered little about the events of the night. (R., Tr., p. 1508).

The fact of petitioner's prior conviction for involuntary manslaughter could have been revealed during the

guilt phase of the trial had petitioner taken the stand, a factor that could not but further damage any defense petitioner presented. In fact, petitioner's prior conviction, and its possible revelation during the guilt phase of the trial was a major reason his counsel decided not to put him on the witness stand. (R., Evidentiary Hearing, July 12, 1985, p. 126).

Petitioner's exculpatory statement, given the police shortly after his arrest, in which he put the blame for the victim's injuries on his co-defendant was read to the jury during the state's case in chief.

Had petitioner testified at trial, he may have had difficulty in reconciling for the jury his defense of lack of intent to commit the crime due to intoxication, and his prior statement that someone else committed the crime.

We cannot second-guess counsel's strategy in not calling petitioner to the stand. The decision not to do so was not outside the realm of effective representation.

Mr. Weidner testified during the state evidentiary hearing that he consulted with petitioner on several occasions concerning not calling him as a witness. (R., Evidentiary Hearing, July 12, 1985, p. 124-25). It was not brought out, however, if counsel, as claimed by petitioner, gave him an opportunity to make the decision himself as to whether he wanted to testify. Petitioner does not claim he made a request of his counsel to testify, he merely asserts he was not given an opportunity to make that choice.

Even assuming that petitioner in fact was not given the opportunity by counsel to make that decision, he has

failed to establish that he was prejudiced by the alleged error. Petitioner does not indicate what his testimony would have been had he testified during trial.

g) Counsel Failed To Adequately Prepare Defense Witnesses For Trial

Petitioner complains that his attorney called only five witnesses in his defense and spent only one-half hour with two of those witnesses, his sister and brother-in-law, in preparing their testimony for trial.

Brevity of time spent by counsel in preparing a case is not of itself sufficient to provide relief to a habeas applicant. Schwander v. Blackburn, 750 F.2d 494 (5th Cir. 1985)

Petitioner does not indicate what additional facts would have been established at trial had counsel spent more time with the two witnesses mentioned above. It is unclear by petitioner's statement that "a total of only five defense witnesses were called to testify," whether he is complaining that other witnesses should have been called. One of petitioner's present counsel filed an affidavit in the state court proceedings that petitioner's sister gave her the names of several witnesses who would have been available to testify at petitioner's trial. (R., Application for Writs to Louisiana Supreme Court, NO. 84 KP 0919, Exhibit S). This list of potential witnesses all appear to be relatives of petitioner. There are no allegations, however, as to what their expected testimony would be.

Without specific allegations of the expected testimony of other witnesses and some indication that they

would have been available to testify at trial, petitioner has failed to establish prejudice.

h) Counsel Failed to Call An Expert To Give An Opinion As To The Effect Of Alcohol On Petitioner

Petitioner, while acknowledging that his attorney obtained the testimony of two physicians in aid of his defense of toxic psychosis, complains that his attorney should have procured other experts, who, presumably after examining petitioner, would be able to testify as to the effect alcohol has on petitioner.

The two experts who testified on petitioner's behalf were Doctors Albert DeVilliere and Genevieve Arneson, psychiatrists, who had been appointed to a pre-trial lunacy commission to examine petitioner. Each examined petitioner approximately for one-half hour in connection with that earlier proceeding and concluded that petitioner understood the nature of the charges filed against him and was able to assist his attorney in his defense.

Counsel for petitioner was successful at trial in eliciting opinions from these two experts which supported the defense of toxic psychosis. (R., Tr., pp. 1337, 1338, 1409).

Petitioner complains, however, that these opinions were based upon a set of hypothetical facts only, and that counsel should have procured an expert who could have testified as to the actual effect of alcohol on him.

Petitioner does not suggest what type of examination would produce the type of results he seeks or that those results would even be obtainable.

Dr. DeVilliere testified both at trial and during the sanity commission proceeding that there are no tests to determine a man's intent or the effect of toxic psychosis on that intent at the time of the crime. He claimed that a physician would have to be at the scene of the crime during its commission to be in a position to render such an opinion. (R., Tr., pp. 436, 1314).

Petitioner offers no evidence that establishes he actually suffered from toxic psychosis to justify our considering his claim.

i) Counsel Failed to Present A Closing Argument During The Guilt Phase of Trial

Petitioner complains that his attorney was deficient in not presenting a closing argument during the guilt phase of trial.

Mr. Weidner testified during the state evidentiary hearing that he made a deliberate decision not to give a closing argument based upon two separate considerations. First of all, he was knowledgeable of the prosecutor's reputation for presenting strong and damaging rebuttal arguments. Since the prosecutor had given what Weidner considered to be a "mild" closing argument, he hoped to prevent, by not giving a closing argument, the prosecutor presenting a stronger rebuttal. (R., Evidentiary Hearing, July 15, 1985, p. 128).

Secondly, Weidner realized the strong case the state had against his client as to his guilt and felt the chance of salvaging anything for his client was in the penalty phase

where he hoped for a recommendation of life imprisonment. To further any possibility for success in the penalty phase, Weidner decided not to risk what credibility he may have had with the jury by advancing arguments as to petitioner's innocence that the jury might perceive to have been totally unsupportable.

While an attorney's decision to waive closing argument might ordinarily deprive a defendant of the effective assistance of counsel, we do find that to be the result in the case before us.

Mr. Weidner believed the case against his client on the guilt phase to be very strong. Prior counsel, Beevers, had withdrawn from the case after he and Sam Dalton, a Jefferson attorney experienced in the defense of capital cases, failed to convince petitioner to accept a plea bargaining agreement to plead to the lesser charge of second degree murder. They likewise had believed the case against petitioner to be very strong. (R. Evidentiary Hearing, July 195, 185, p. 14-15.).

Under the circumstances, the jury could not help but to have understood the nature of petitioner's defense. They were apprised of it during voir dire and counsel's opening statement. The testimony of defense witnesses as to aspects of the theory of defense was simple and direct. Counsel's participation in the entire trial was quite active. See Martin v. McCotter, No. 85-1311, slip. op. 8385-86 (5th Cir. August 13, 1986).

We are convinced that had counsel presented a closing argument, the jury's verdict would not have been different.

j) Counsel Presented An Unprepared Defense During The Penalty Phase Of The Trial

Petitioner complains that counsel did not conduct a proper investigation in connection with the penalty phase of his trial which resulted in the failure to call other witnesses or present mitigating evidence.

With the possible exception of the names of relatives contained in his attorney's affidavit mentioned above, petitioner does not identify these additional witnesses or the substance of their testimony. He does not indicate what additional evidence his sister would have offered.

Petitioner does not furnish us any medical reports connected with his brief stay in a mental hospital some thirteen years prior to the commission of the crime. He does not claim he was treated for or suffered from any mental condition since that earlier hospitalization.

The fact that petitioner had been hospitalized was brought out during the testimony of petitioner's witnesses in the penalty phase of the trial.

Petitioner has not established prejudice in connection with the above issue.

k) Counsel Failed To Object Or Move For A Mistrial During Improper Argument By The Prosecutor During The Penalty Phase Of Trial

Petitioner, in support of the above claim, refers to statements made by the prosecutor which are set out in claims of alleged error in his application for relief, i.e., claims 4 and 5 below.

We find no prejudice to petitioner based upon the above alleged error for reasons that will be obvious when we treat this issue more fully in connection with petitioner's claims 4 and 5 below.

1) Counsel Failed To Object To Erroneous Instructions Given Jury By Court During Guilt And Penalty Phase Of Trial

Petitioner claims that counsel should have objected to the trial court's a) failure to instruct the jury as to how they should treat a defendant's failure to testify; b) instruction on intent; and, c) instruction defining principles.

We will treat below petitioner's complaints as to b and c above, in connection with related issues raised in claims 8 and 9.

As to counsel's failure to object to the court's charge to the jury in that it did not include a charge as to how the jury should treat a defendant's failure to testify on his behalf, Mr. Weidner testified during the state hearing that he purposely requested the court to omit that charge to avoid calling undue attention to the fact that petitioner did not take the stand. (R., Evidentiary Hearing, July 12, 1985, pp. 150-51). Mr. Weidner's decision falls within the definition of trial strategy.

If the particular charge had been included in the court's instructions, the result of the trial would not have been different.

m) Counsel Failed To Make An Effective Closing Argument During The Penalty Phase Of The Trial

Counsel's argument during the penalty phase of the trial is contained in approximately one typewritten page of the trial transcript.

Petitioner complains that the argument was cursory, perfunctory and unpersuasive. We conclude that it was unpersuasive because it was unsuccessful, but lack of success of itself would not result in a conclusion that counsel was ineffective.

The remarks of counsel were of a cursory and perfunctory nature, but petitioner has not established that the jury's recommendation would have been different had counsel dealt longer on mitigating factors favoring him. There was little available by way of mitigation in petitioner's favor.

4. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner complains that the prosecutor was guilty of misconduct when he made references to the possibility of a pardon for petitioner if the jury recommended life imprisonment. Additionally, he claims that the assistant district attorney's appeal to a "war on crime", or "community expectation" argument to the jury prejudiced

him. The portions of the rebuttal argument to which petitioner objects follows:[6]

> "At that point in time the only thing you will have to worry about is whether or not Robert Sawyer will ever be back on the streets of Jefferson Parish. The man's personality has already been formed. The statute speaks without benefit of probation, suspension, commutation of sentence. The statue (sic) does speak about a pardon. The statute doesn't speak about a commutation so don't think that if you vote for first degree murder, I'm sorry, for life imprisonment that that will be the end of this matter as it relates to Robert Sawyer because it's not. Tr.Tr. 986:14-29.
>
> . . . if the law which we have in this state is to have any piece [sic], if it's to have any meaning, if it's to have any impact on all the other people out on the streets that are committing crimes and murders and rapes and robberies, that is affecting you and me and every member of your family. That has made the good people of this community become prisoners in their own homes in putting bars up in their homes. They are the ones who are suffering. If the statute is to have any weight behind it at all, my God, ladies and gentlemen this is the time to draw the lines because if a man can commit this type of crime, do this type of thing to this woman in front of two children with a prior conviction for

[6] Petitioner also refers us in his petition to the prosecutor's entire closing argument and rebuttal, both in the guilt and penalty phase of the trial in support of his claim of prosecutorial misconduct without pointing out specific portions of the argument as constituting error. Mere conclusory allegations of error are insufficient to support a claim for relief. See Ross v. Estelle, 694 F.2d 1008 (5th Cir. 1983).

killing a four year old child, then what are the people of this Parish to believe. They are going to believe what a lot of people believe, there is a lot of law and a lot of judges but the judges are letting the criminals out, the law never has any affect. . . . Tr.Tr. 987-17-29; 988:1-6." (R., Petition, p. 170).

The Louisiana Supreme Court discussed in its opinion affirming petitioner's conviction, the prosecutor's reference to the possibility of a pardon, and found petitioner's claim to be without merit.

That Court held:

" . . . There is another factor in this case which we have considered, even though there was no contemporaneous objection, because of the possibility of prejudicial influence on the jury's recommendation of death. State v. Willie, 410 So. 2d 1019 (La. 1982). In the final closing argument, the district attorney alluded briefly to the possibility of pardon. In prior cases (decided after this trial), we have warned against such an argument, and we have ordered new penalty hearings in cases in which we concluded that the particular argument constituted an improper influence on the jury. See State v. Lindsey, 404 So.2d 466 (La. 1981), and State v. Willie, above. We have never held, however, that an automatic reversal of the death penalty must follow the mere mention of the fact that R.S. 14:30's prohibition against probation or parole for one under sentence of life imprisonment does not exclude executive pardon. Each case must be decided on its own facts and circumstances.

Here, the cryptic and brief comment came in response to the defense attorney's final plea to the jury to spare defendant's life and to sentence him to the 'living death of life imprisonment',

which implied that defendant could never be released. Had the prosecutor done more than make a passing responsive comment on the possibility of a pardon, perhaps a reversal would be warranted. However, the prosecutor did not dwell on the speculative prospect of future action by the executive nor suggest to the jury that the speculative possibility of future release is a valid reason for recommending the death sentence. Thus, in the context of the entire argument, the prosecutor's responsive remark neither deflected the jury's attention from the ultimate significance and finality of the penalty recommendation nor misguided the jury's sentencing discretion by the introduction of the inappropriate considerations." [Footnotes ommitted]. State v. Sawyer, supra, 422 So.2d at 104.

We do not disagree with the Supreme Court's conclusion on this issue. Nor do we find merit to petitioner's claim that the prosecutor's use of a "war on crime" argument or his appeal to the jury that the community might not understand a verdict which did not impose the death penalty prejudiced him. See Whittington v. Estelle, 704 F.2d 1418 (5th Cir. 1983), cert. denied, 464 U.S. 983, 104 S.Ct. 428, ___ L.Ed.2d ___ (1983).

A prosecutor is permitted in closing argument to state to the jury what he believes to have been established and to comment fairly on it. Whittington v. Estelle, supra.

Prejudicial comments by a prosecutor in closing argument will justify federal habeas relief only if the error was material in the sense of a crucial, critical and highly significant factor. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981); Lowery v Estelle, 696 F.2d 333 (5th Cir. 1983).

A prosecutor's improper argument to the jury

> " . . . [d]oes not present a claim of constitutional magnitude which is cognizable in a proceeding under 28 U.S.C. 2254 unless such argument is so prejudicial that the appellant's state court trial was rendered fundamentally unfair within the meaning of the Due Process Clause of the Fourteenth Amendment." Whittington v. Estelle, supra, at 1421.

In viewing the remarks of the prosecutor in the context of the entire trial, which we must, we conclude that the remarks were not so prejudicial as to render the trial fundamentally unfair.

Since petitioner was not prejudiced by the remarks, petitioner is not entitled to relief on his claim of ineffective assistance of counsel presented in claim 3, k above.

5. PROSECUTORIAL MISCONDUCT DURING CLOSING ARGUMENT

Petitioner additionally complains of the following closing remarks by the prosecution as being prejudicial:

> " . . . you yourself will not be sentencing Robert Sawyer to the electric chair. What you are saying to this Court, to the people of this Parish, to any appellate court, the Supreme Court of this State, the Supreme Court possibly of the United States, that you the people as a fact finding body from all the facts and evidence you have heard in relationship to this man's conduct are of the opinion that there are aggravating circumstances as defined by the statute, by the State legislature that this is the type of crime that deserves that penalty. It is merely a recommendation so try as he may, if Mr. Weidner tells you

> that each and every one of you I hope you can live with your conscience and try and play upon your emotions, you cannot deny, it is a difficult decision. Tr.Tr. 982: 6-21.
>
> You are the people that are going to take the initial step and only the initial step and all you are saying to this court, to the people of this Parish, to this man, to all the Judges that are going to review this case after this day, is that you the people do not agree and will not tolerate an individual to commit such a heinous and atrocious crime to degrade such a fellow human being without the authority and the impact, the full authority and impact of the law of Louisiana. All you are saying is that this man from his actions could be prosecuted to the fullest extent of the law. No more and no less. Tr.Tr. 984:10-21." (R., Petition, p. 18).

The issue raised by the above quoted argument of the prosecutor is a vague reference to the possible review of the jury's verdict by a higher court.

An argument by a prosecutor, in the penalty phase of a capital case, which suggests to the jury that its responsibility is lessened by appellate review has been condemned in Caldwell v. Mississippi, ___ U.S. ___, 105 S.Ct. 2633, 86 L.Ed.2d 231 (1985).

The State prosecutor in the case *sub judice* made another reference to possible review of the jury's verdict by a higher court of which petitioner does not complain.

> "It's all your doing. Don't feel otherwise. Don't feel like you are the one, because it is very easy for defense lawyers to try and make each and every one of you feel like you are pulling the switch. That is not so. It is not so and if you are wrong in your decision believe me, believe me

there will be others who will be behind you to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions. You've done the right thing so far. There can be no doubt that Robert Sawyer committed this crime. The evidence is strong and convincing although he still denies that. He still states he was so intoxicated he doesn't remember anything about this crime. He gave a statement two hours after the crime admitting or at least telling everyone about it. I could have crossed examined him and gone more into it and gotten more and more lies but his guilt has already been decided.

I ask that you consider what I have just told you and I may or may not be back to speak to you in a brief rebuttal Mr. Weidner argues. Thank you." (R., Tr., p. 1519).

Because petitioner did not complain of the comments immediately above, either in his habeas application filed herein or his state habeas proceedings, we cannot consider whether those comments present any grounds for relief.

Although petitioner has not urged error in the prosecutor's comments quoted immediately above, we should, however, consider the possible effect of those comments on the outcome of the proceedings since we are required to view the comments of which petitioner complains in light of the entire record.

Petitioner's counsel did not object to the prosecutor's comments at the time they were made. The contemporaneous objection rule would not prevent our consideration of the claimed error, as the Louisiana courts themselves

in a death case would not be constrained from considering the merits of the issue. State v. Willie, supra.[7]

While the prosecutor's comments in the instant case dangerously approach reversible error, we do not believe it actually reaches that mark.

The remarks herein are distinguishable from the prosecutor's remarks condemned in *Caldwell*. In *Caldwell*, the assistant district attorney made the following argument in response to the defendant advising the jury of their awesome responsibility in imposing the death penalty:

'ASSISTANT DISTRICT ATTORNEY:
Ladies and gentlemen, I intend to be brief. I'm in complete disagreement with the approach the defense has taken. I don't think its (sic) fair. I think its (sic) unfair. I think the lawyers know better. Now, they would have you believe that you're going to kill this man and they know – they know that your decision is not the final decision. My God, how unfair can you be? Your job is reviewable. They know it. Yet they . . .

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[7] In fact, in the case *sub judice*, the Louisiana Supreme Court sua sponte noticed a potential problem with the prosecutor's reference to a possible pardon despite the absence of a contemporaneous objection. Sawyer, supra, 422 So.2d at 104. It is perhaps significant that the Louisiana Supreme Court, in fulfilling their duty in death cases to view the record for any apparent error in the record, did not consider apparently that the remarks petitioner complains of above were significantly prejudicial.

'COUNSEL FOR DEFENDANT:
Your Honor, I'm going to object to this statement. It's out of order.

'ASSISTANT DISTRICT ATTORNEY:
Your Honor, throughout their argument, they said this panel was going to kill this man. I think that's terribly unfair.

'THE COURT:
Alright, go on and make the full expression so the Jury will not be confused. I think it proper that the jury realizes that it is reviewable automatically as the death penalty commands. I think that information is now needed by the Jury so they will not be confused.

'ASSISTANT DISTRICT ATTORNEY:
Throughout their remarks, they attempted to give you the opposite, sparing the truth. They said "Thou shall not kill." If that applies to him it applies to you, insinuating that your decision is the final decision and that they're gonna to take Bobby Caldwell out in the front of this Courthouse in moments and string him up and that is terribly, terribly unfair. For they know, as I know, and as Judge Baker has told you, that the decision you render is automatically reviewable by the Supreme Court. Automatically, and I think its (sic) unfair and I don't mind telling them so.' Caldwell v. Mississippi, supra, at 2637-38.

A consideration by the *Caldwell* court was that the prosecutor's remarks in that case were "focused, unambiguous and strong" and because the trial judge, not only failed to give a curative instruction, but openly approved the prosecutor's remarks. Caldwell v. Mississippi, supra, at 2645.

The comments complained of herein were ambiguous and not merely as strong as the comments in *Caldwell*. The Court's instructions to the jury in the case herein did not lend support to the prosecutor's statements concerning appellate review. To the contrary, the trial court, after meticulously instructing the jurors on the factors they were to consider in their deliberations, concluded with the injunction, that *"[I]t is your responsibility* in accordance with the principles of law I have instructed whether the defendant should be sentenced to death or to life imprisonment." [Emphasis added]. (R., Tr., p. 1527).

The prosecutor's remarks complained of herein, while suggesting possible appellate review, were not sufficient to form a conclusion that the jury's responsibility was lessened by appellate review. The prosecutor told the jury in effect that you [the jury] by recommending the death penalty will be telling any court that reviews this case that " . . . [t]his man from his actions could be prosecuted to the fullest extent of the law". (R. Tr., p. 1518).

Reference to possible appellate review should not result, in all cases, in an automatic reversal of a death penalty.

As observed in State v. Mattheson, 407 So.2d 1150, 1165 (La. 1981), cert. denied, 463 U.S. 1229, 103 S.Ct. 3571, 77 L.Ed.2d 1412 (1983); quoting State v. Berry, 391 So.2d 406 (La. 1980), cert. denied, 451 U.S. 1010, 101 S.Ct. 2347, 68 L.Ed.2d 863 (1981) " . . . virtually every person of age eligible for jury service knows that death penalties are reviewed on appeal. There is no absolute prohibition against references to this fact of common knowledge, and

the court should not impose an absolute prohibition, since such a reference does not necessarily serve to induce a juror to disregard his responsibility". See also Moore v. Maggio, 740 F.2d 308, 320 (5th Cir. 1984); on subsequent application for habeas relief, 774 F.2d 97, 98 (5th Cir. 1985).

Although *Mattheson* was decided prior to *Caldwell*, its rationale appears to comport with the holding in *Caldwell*.

Even considering the prosecutor's remarks in connection with the comments appearing on page 1519 of the trial transcript, petitioner was not prejudiced. Those later comments, although "hinting" that an appellate court might have the final decision on the imposition of the death penalty, the comments are ambigious at best.

The prosecutor told the jury:

> " . . . [a]nd if you are wrong in your decision, believe me, believe me there will be others who will be behind you *to either agree with you or to say you are wrong so I ask that you do have the courage of your convictions.*" (R., Tr., p. 1519). [Emphasis added].

The above quote, when viewed as a whole, would not necessarily suggest to the jury that its responsibility is lessened, considering the prosecutor's statement to the jury to " . . . have the courage of your convictions".

The standard to be employed in determining whether prejudice resulted from alleged improper remarks by the prosecutor, condemned in *Caldwell*, is the "reasonable probability" test for determining prejudice established by Strickland v. Washington, supra. See Brooks v. Kemp, 762 F.2d 1383 (11th Cir. 1985) en banc; Bowen v. Kemp, 769

F.2d 672 (11th Cir. 1985), rehearing denied, 776 F.2d 1486 (commenting that there is no incompatibility between the standard enunciated in *Caldwell* and that established in *Strickland*). rehearing en banc denied, 778 F.2d 623 (11th Cir. 1985).

The defendant must show under the appropriate standard, " . . . that there is a reasonable probability that, but for counsel's [prosecutor's] unprofessional errors, the result of the proceeding would have been different: a reasonable probability is a probability sufficient to undermine confidence in the outcome". Strickland v. Washington, supra. 104 S.Ct. at 2068.

In the instant case, the jury found two aggravating circumstances to support its recommendation of the imposition of the death penalty, when only a finding of one would have been sufficient. The evidence of defendant's guilt was ample. There was little in the way of mitigating evidence. The court's instructions properly directed the jury's attention to those factors it was to consider in arriving at a recommendation.

The Louisiana Supreme Court, upon review of the record on appeal, determined:

> "We are convinced . . . that the jury's recommendation was not reached arbitrarily and was not based on improper considerations, and we have been shown no basis for overturning the recommendation on appeal." State v. Sawyer, supra, 422 So.2d at 106.

The court's finding is entitled to great weight. Wingo v. Blackburn, supra.

We conclude, based on the above considerations, that there is no reasonable probability, that but for the prosecutor's alleged professional errors, the recommendation of the jury would have been different.

For these same reasons, we conclude that petitioner has failed to establish prejudice on the claim of ineffective assistance of counsel raised in ground 3, k above.

6. FAILURE TO ALLOW PETITIONER THE RIGHT TO MAKE DECISION AS TO WHETHER HE WOULD TESTIFY ON HIS OWN BEHALF

Petitioner complains that his attorney made the decision on his own as to whether or not petitioner would testify during the guilt phase of the trial without advising him that he had a right to make that decision himself.

A related issue involving a claim of ineffective assistance of counsel has been disposed of above.

Petitioner does not claim that he ever made a request of his counsel to be allowed to testify. Petitioner does not indicate what his testimony would have been had he made the decision to testify. Petitioner has not established that he was prejudiced by the alleged error.

7. TRIAL COURT'S FAILURE TO INSTRUCT THE JURY AS TO HOW THEY SHOULD TREAT A DEFENDANT'S FAILURE TO TESTIFY

Petitioner claims that he was prejudiced by the trial court's failure to include an instruction to the jury that a

defendant is not required to testify and that no presumption of guilt may be drawn from the fact that a defendant does not testify.

The record reflects that the state judge's instructions to the jury did not contain such a charge.

Mr. Weidner testified at the evidentiary hearing that he requested the trial judge not to include the above charge in the court's instructions as a strategy moved to avoid undue attention being drawn to the fact that defendant did not take the stand in his defense.

No error was committed by the court for failing to include the charge since it was purposefully omitted at the request of defense counsel.

We have already disposed of petitioner's allegations that counsel's request to the court to omit the charge constituted ineffective assistance of counsel.

8. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED STATE OF BURDEN OF PROOF

Petitioner complains that the following instruction given the jury by the trial court had the effect of relieving the state from its burden of proving "specific intent" an element of the crime.

> "A specific intent to kill may be implied where there are no external signs of the intent beyond the mere facts of the homicide itself, if there were no just grounds for the killing, when the killing was without provocation or upon so slight a provocation as not to justify the killing. Tr.T. 926:19-24." [R. Tr., p. 1481].

For a trial error to be reviewable in Louisiana, an objection must be made at the time of its occurrence. LSA Louisiana Code of Criminal Procedure Art. 841. Absent cause for the procedural default and actual prejudice from the error, principles of comity and federalism prevent federal courts from granting habeas corpus relief to a state prisoner whose claim would not be reviewable in the state court because of the default. Engle v. Isaac, 456 U.S. 107, 102 S.Ct. 1558, 71 L.Ed.2d 783 (1982); Wainwright v. Sykes, 433 U.S. 72, 97 S.Ct. 2497, 53 L.Ed.2d 594 (1977). Petitioner does not allege cause for the failure to object to the charge. A claim that the "cause" was due to counsel's ineffectiveness is not sufficient to establish cause. Washington v. Estelle, 648 F.2d 276 (5th Cir. 1981), cert. denied, 454 U.S. 899, 102 S.Ct. 402, 70 L.Ed.2d 216 (1981). See Weaver v. McKaskle, 733 F.2d 1103 (5th Cir. 1984); Stokes v. Procunier, 744 F.2d 475 (5th Cir. 1984).

Even if cause existed for failure to object to the charge, petitioner would not be entitled to relief on the above claim. The complained of charge quoted above is only a small part of the entire instruction given the jury on "specific intent". The quote is taken out of context. A review of the court's entire charge on that element of the offense reveals that the jury was instructed how they *may* treat various factual circumstances [including the one petitioner complained of] in order to determine whether a defendant had specific intent to kill someone. [Emphasis added]. The court concluded by telling the jury: "Therefore you should determine whether or not there was criminal intent by considering all of the facts and circumstances of this case". (R., Tr., p. 1482).

Because we would determine the charge complained of to have been proper, petitioner's companion claim that counsel's failure to object to the charge constituted ineffective assistance of counsel is without merit.

9. TRIAL COURT'S INSTRUCTION IMPROPERLY RELIEVED STATE OF BURDEN OF PROOF

Petitioner complains that the following charge on the law of principles improperly relieved the state of its burden to prove specific intent.

> "All persons concerned in the commission of a crime, whether present or absent, and whether they directly commit the act constituting the offense, aid and abet in its commission or directly or indirectly counsel or procure another to commit the crime are principle.
>
> In order words, to be concerned in the commission of a crime, it must be shown that the person or persons charged did something knowingly and intentionally in furtherance of the common design, or to put it another way, that he or they aided, abetted and assisted in the perpetration of the offense.
>
> All persons knowing the unlawful intent of the person committing the crime, who are present, consenting thereto, and aiding and abetting either by furnishing the weapons of attack, encouraging by words or gestures, or endeavoring at the time of the commission of the offense, to secure the safety or concealment of the offender, are principals and equal offenders and subject to the same punishment. (T.T. 931:5-24)." [R., Tr., p. 1466].

No contemporaneous objection was made in connection with the above charge to the jury and there is no

objection of cause for the failure to object to the charge. This claim as well as petitioner's companion claim of counsel's failure to object to the above charge is without merit.[8]

10. TRIAL COURT ERRED IN EXCUSING A JUROR WHO EXPRESSED ONLY A GENERAL OPPOSITION TO THE DEATH PENALTY

Petitioner complains that the court excused a prospective juror after she expressed only a general opposition to the imposition of the death penalty.

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[8] Petitioner would not succeed on the merits of this claim. Petitioner argues in his brief that the above instruction might have caused the jury to have found him guilty if they believed that he failed to prevent Land from beating the victim. Petitioner fails to include the trial court's complete charge on principles which include an instruction that a person cannot be considered a principal under the circumstances suggested by petitioner. (R., Tr., p. 1467). Clark v. Louisiana State Penitentiary, 694 F.2d 75 (5th Cir. 1982), reh'g denied, 697 F.2d 699 (1983) cited by petitioner in support of his claim involved a conspiracy instruction and its holding is inapposit (sic) to the conclusion we reach herein. In the instruction given herein, the court charged the jury that a principal is one who " . . . [k]nowing the unlawful intent of the person committing the crime . . . , [and] . . . consenting thereto. . . ." aids and abets in the commission of the crime. (R., Tr., p. 1466). The prosecutor referred to the law or principals in his closing argument. (R., Tr., p. 1444). However, it was in reference to petitioner being a principal in the aggravated rape of Ms. Arwood. The argument was harmless, since the jury did not find the aggravated rape to have been an aggravating circumstance after the penalty hearing. The evidence at trial established that petitioner did not participate in the crime merely as an aider and abetter. He himself beat the victim, caused her to become unconscious when he kicked her into the bathtub, poured the lighter fluid on her and lit her on fire.

The juror, Gwendolyn Lee, when asked her feelings toward the death penalty, replied:

"What are your feelings about capital punishment?

A. I don't agree with it.

Q. You say you don't agree with it. That is regardless of what the evidence may show, no matter how heinous of a crime, you are telling me you are morally or religiously, no matter what the evidence may show you could not even consider the imposition of the death penalty?

A. No I don't think it is fair.

Q. You don't think it's fair. You have had this belief for quite some time?

A. Yes.

Q. Is this a religious belief, is the death penalty contrary to your religion?

A. Yes.

Q. You have strong contrary objections to it no matter what the evidence may show.

A That is right.

* * *

THE COURT:

Let me explain this to you, Mrs. Lee. We do have a death penalty in Louisiana. That doesn't mean it would be imposed in this case or any other case. What Mr. Weidner is asking you if the facts of this case indicate that the death penalty should be imposed, could you vote for it under those circumstances?

MRS. LEE:

I really don't think I could.

THE COURT:

You don't think you could?

MRS. LEE:

No." (R., Tr, pp. 811-813).

The inquiry that we must make to determine if a juror may be excluded for his or her views on capital punishment is whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath. Wainwright v. Witt, ___ U.S. ___, 105 S.Ct. 844, 83 L.Ed.2d 841 (1985); Wicker v. McCotter, 783 F.2d 487 (5th Cir. 1986).

This test is to be applied primarily by the trial judge and his determination that a juror should be excused because of his or her views on capital punishment is accorded a presumption of correctness under 28 U.S.C. § 2254(d). Wicker v. McCotter, supra, at 493.

There is support for the trial court's determination that Mrs. Lee's views on capital punishment might substantially impair her performance as a juror.

11. VIOLATION OF PETITIONER'S RIGHTS UNDER EIGHTH AND FOURTEENTH AMENDMENT WHEN ONE OF AGGRAVATING CIRCUMSTANCES NOT SUPPORTED BY EVIDENCE

The issue petitioner raises under this claim is essentially a complaint that he was prejudiced in the penalty phase of his trial by the introduction of a crime, the

involuntary manslaughter of a child, which was unrelated to any aggravating circumstances upon which the jury could find in imposing the death penalty.[9]

Although petitioner does not articulate the constitutional error present in this claim, it would appear that he is complaining of the same error that was raised in his direct appeal and on which the United States Supreme Court remanded to the Louisiana Supreme Court for further consideration in light of the former Court's holding in Zant v Stephens, 462 U.S. 862, 103 S.Ct. 2733, 77 L.Ed.2d 235 (1983). Sawyer v. Louisiana, 463 U.S. 1223, 103 S.Ct. 3567, 77 L.Ed.2d 1407 (1983).

The court in *Zant* held *inter alia* that a death sentence based upon two or more statutory qualifying grounds, one of which was later determined to be invalid, would not automatically require reversal of the death penalty unless it was determined that the deficient ground was invalidated on the basis it involved constitutionally protected activity, or the penalty was arbitrary and capricious because the invalidated ground involved in introduction of evidence not otherwise admissible.

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[9] It is unclear from the petition filed by petitioner whether he is also complaining that evidentiary support for all of the aggravating circumstances found by the jury was required. This issue, if raised, is without merit. This issue was treated fully in petitioner's direct appeal. The Louisiana Supreme Court held that an " . . . [a]dequately supported finding of the existence of one aggravating circumstance is alone sufficient to place defendant in that category of offenses properly exposed to the possibility of the death sentence. See Williams v. Maggio, 679 F.2d 381 (5th Cir. 1982) (en banc)." State v. Sawyer, 422 So.2d at 101-102.

On remand, the Louisiana Supreme Court held that the holding in *Zant* did not preclude the affirmance of the imposition of the death penalty in petitioner's case since the evidence of the manslaughter conviction, even if erroneously admitted to support one of the aggravating circumstances, was properly admitted to shed light on petitioner's character. Sawyer v. Louisiana, 442 So.2d 1136 at 1139-40.

A defendant's character constitues (sic) valid considerations by the jury during the penalty phase of the trial. LSA Louisiana Code of Criminal Procedure Art. 905.2.

Petitioner's application for writ of certiorari to the United States Supreme Court from the decision of the state court after remand was denied. Sawyer v. Louisiana, ___ U.S. ___, 104 S.Ct. 1719, ___ L.Ed.2d ___ (1983).

Petitioner does not raise a constitutional question under the present claim as the evidence of manslaughter conviction was properly admissible under Louisiana law to establish petitioner's character, an important and relevant issue during the penalty phase of the trial.

12. *INADMISSIBLE EVIDENCE WAS INTRODUCED DURING PENALTY PHASE OF TRIAL*

Petitioner next complains about the prosecutor's reference during the penalty phase of the trial to the hearsay statements of uncalled witnesses, that the child, who was the victim of the Arkansas manslaughter conviction, was the victim of prior physical abuse at the hands of petitioner.

Petitioner refers in his petition to the following statements of the prosecutor as objectionable:

> "If I were to tell you that I have in my custody the District Attorney's file from Arkansas relating to that conviction where Robert committed a homicide of a four year old girl and if I told you in this file I have statements of six people that Laura Durham, a four year old child, was an abused child, that (sic) constantly beaten by your brother, would you believe those six people? (See T.T. p. 961)." (R., Tr., p. 1496).
>
> "I will read to you a hospital report in reference to little Laurie. Four year old white female, Miss Laura Sawyer arrived at the emergency room on December 4, 1973 at 1:44 p.m. She was brought to the emergency room by Robert Sawyer. The emergency room recorded her address as such and such. . . ." See T.T. 961-962. (R., Tr., p. 1496-97).

Petitioner goes on to complain that subsequent to the second statement quoted above, the prosecutor elicited testimony from the state's witness about information that the child was the victim of prior abuse, which information was contained in the hospital report prepared on the date the child was admitted with her fatal injury.

The prosecutor apparently used this material in an attempt to counteract the favorable testimony of petitioner's sister that he took good care of the child.

Petitioner admitted in his testimony during the penalty phase of the trial that the child did have bruises on her body the day she was brought to the hospital. He denied that the prior injuries were caused by him, but laid the blame on the child's mother.

Petitioner did not object at trial to the testimony of which he now complains herein. The contemporaneous objection rule is not an issue in considering this claim, however, since the state has not raised the rule in connection with this claim in its response to the petition. See Miller v. Estelle, 677 F.2d 1080 (5th Cir. 1982), cert. denied, 459 U.S. 1072, 103 S.Ct. 494, 74 L.Ed.2d 636 (1982).

Hearsay testimony, with certain limited exceptions, is generally inadmissible. We can only conclude, without any suggestion to the contrary by the respondent, that the statements and testimony complained of herein were inadmissible.

The admission of the testimony complained of above must have resulted in a denial of fundamental fairness to entitle him to habeas corpus relief in this Court. Scott v. Maggio, 695 F.2d 916 (5th Cir. 1983).

> " . . . [t]he mere erroneous admission of prejudicial testimony does not in itself, justify federal habeas relief unless it is 'material in the sense of a crucial, critical, highly significant factor,' in the context of the entire trial." Menzies v. Procunier, 743 F.2d 281, 288 (5th Cir. 1984) quoting Porter v. Estelle, 709 F.2d 944, 957 (5th Cir. 1983).

Petitioner admitted that he had spanked the child with a belt on several occasions prior to her death. Any reference by the prosecutor, in light of that admission, that he had statements from six people that petitioner constantly beat the child was harmless.

Petitioner has failed to demonstrate fundamental fairness.

Petitioner additionally complains about the use, during his cross-examination, of a prior statement he gave in connection with the Arkansas case. He claims that the prosecutor introduced the statement without first establishing at trial that the statement was voluntary.

Petitioner failed to establish prejudice. The burden of proof in an habeas application is upon the habeas petitioner. Walker v. Maggio, 738 F.2d 714 (5th Cir. 1984), cert. denied, ___ U.S. ___, 105 S.Ct. 793, ___ L.Ed.2d ___ (1985); Hayes v. Maggio, 699 F.2d 198 (5th Cir. 1983). Petitioner has set forth no facts which would suggest that the prior statement was not voluntary.

13. *PETITIONER'S SENTENCE IS EXCESSIVE AND DISPROPORTIONATE*

14. *PETITIONER'S SENTENCE IS ARBITRARY AND CAPRICIOUS*

15. *ELECTROCUTION IS A CRUEL AND UNUSUAL MEANS OF PUNISHMENT*

16. *PETITIONER'S SENTENCE IS INVIDIOUSLY DISCRIMINATORY*

17. *CAPITAL PUNISHMENT IS AN EXCESSIVE PENALTY*

18. *THE CUMULATIVE EFFECT OF VIOLATIONS OF PETITIONER'S RIGHTS IS IN ITSELF A VIOLATION OF PETITIONER'S CONSTITUTIONAL RIGHTS*

The grounds for relief raised in the above six claims are conclusory in nature. Petitioner offers no support in fact or law to justify their consideration.

RECOMMENDATION

It is recommended that the application for writ of habeas corpus filed on behalf of petitioner, Robert Sawyer, be DENIED and that the stay of execution be VACATED.

Failure to file written objections to the proposed findings and recommendations contained in this report within ten days from the date of its service shall bar an aggrieved party from attacking the factual findings on appeal. Nettles v. Wainwright, 677 F.2d 404 (5th Cir. 1982).

New Orleans, Louisiana, this 8 day of September, 1986.

/s/ Ronald A. Fonseca
RONALD A. FONSECA
United States Magistrate